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Andrew Gallegos and Joan Gallegos v. James Lloyd, Julie Lloyd, Mountain America Federal Credit Union, Mortgage Electronic Registration Systems Inc, Countrywide Home Loans Inc, America's Wholesale Lender, J. Scott Lundberg, Carey Johansen and Land Design : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

ANDREW GALLEGOS and JOAN GALLEGOS,	:	
Plaintiffs/Appellees,	:	Case No. 20061135
v.	:	
JAMES LLOYD; JULIE LLOYD, et al.,	:	
Defendants/Appellants.	:	

BRIEF OF PLAINTIFFS/APPELLEES ANDREW AND JOAN GALLEGOS

Appeal from Portions of a Judgment and Supplemental Judgment of the Third Judicial District Court Awarding Attorney's Fees, Honorable John Paul Kennedy, Presiding

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STATEMENT OF JURISDICTION

The Court of Appeals has jurisdiction over this appeal pursuant to Utah Code Annotated § 78-2a-3(2)(a).

STATEMENT OF ISSUES AND STANDARD OF REVIEW

I. Whether the trial court correctly awarded attorney's fees under Utah Code Annotated § 78-27-56(1) by specifically finding that the Defendants/Appellants James and Julie Lloyd (the "Lloyds") defense of the case was without merit and asserted in bad faith.

Preservation of Issue: This issue was preserved in the trial court in Plaintiffs/Appellees Andrew and Joan Gallegos' (the "Gallegos") Memorandum in Support of their Motion for Attorney's Fees and Establishment of Costs, (R. at 288-290), and at the hearing on the Gallegos' Motion for Attorney's Fees and Establishment of Costs. (R. at 397; Trans. of Ruling Only on 6/28/06 and Motion on Attorney's Fees on 11/2/06, pp. 9-37.)[1]

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[1] For the Court's convenience, a true and correct copy of the oft cited Transcript of Ruling Only on 6/28/06 and Motion on Attorney's Fees on 11/2/06 is attached hereto as Addendum D. (R. 397.) The Gallegos will hereinafter cite to the Transcript of Ruling Only on 6/28/06 and Motion on Attorney's Fees on 11/2/06 as Addendum D.

Standard of Review: The determination of whether a trial court's findings of fact in support of an award of attorney's fees are legally sufficient is a question of law reviewed for correctness. Valcarce v. Fitzgerald, 961 P.2d 305, 315 (Utah 1998). The question of whether the evidence adequately supports a trial court's findings of fact which in turn sustain an award of attorney's fees is reviewed under a clearly erroneous standard. Menzies v. Galitka, 2006 UT 81, ¶ 55, 150 P.3d 480. Likewise, a trial court's determination that an action was defended in bad faith is a factual determination reviewed under a clearly erroneous standard. Warner v. DMG Color, Inc., 2000 UT 102, ¶ 21, 20 P.3d 868.

II. Whether the trial court correctly awarded attorney's fees as consequential damages.

Preservation of Issue: This issue was preserved in the trial court in the Gallegos' Memorandum in Support of their Motion for Attorney's Fees and Establishment of Costs, (R. at 288-290), and at the hearing on the Gallegos' Motion for Attorney's Fees and Establishment of Costs. (R. at 397; Addendum D.)

Standard of Review: The determination of whether attorney's fees are recoverable in an action is a question of law reviewed for correctness. Valcarce, 961 P.2d at 315.

PROVISIONS OF STATUTES AND RULES

The interpretation of Utah Code Annotated § 78-27-56(1) and Utah Rule of Appellate Procedure 24(a)(9), are of importance to this appeal, copies of which are attached hereto as Addenda A and B respectively.

STATEMENT OF THE CASE

Nature of the Case and Course of Proceedings Below

This is a trespass case which arose from a situation where the Lloyds constructed their home in such a fashion that it encroached approximately 38' on to the Gallegos' adjacent lot, thereby appropriating the superior views and topography enjoyed by the Gallegos' lot. The case was tried to Judge John Paul Kennedy on June 27-28, 2006. The trial court ruled in favor of the Gallegos and entered Findings of Fact, Conclusions of Law and a Judgment and Decree on July 19, 2006. (R. at 305-319).[2] Based on its Findings of Fact and Conclusions of Law,

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[2] For the Court's convenience, a true and correct copy of the trial court's oft cited Findings of Fact and Conclusions of Law are attached hereto as Addendum C. (R. 305-316.) The Gallegos will hereinafter cite to the trial court's Findings of Fact and Conclusions of Law as Addendum C.

the trial court awarded the Gallegos their attorney's fees under Utah Code Ann. § 78-27-56(1) and as consequential damages to the Lloyds' trespass. (See id.) The amount of said fees was established by Rule 73 motion, and the trial court affirmed its award of fees as well as the amount thereof in its Supplemental Judgment for Attorney's Fees and Costs that was entered on November 15, 2006. (R. at 370-372). This appeal followed.

Statement of Facts

This case arose when the Lloyds constructed a portion of their home and related landscaping on a residential building lot owned by the Gallegos ("Lot 102") in the Emigration Oaks Subdivision in Salt Lake County. (Addendum C at ¶ 13.) After being confronted with the trespass by the Gallegos, the Lloyds failed to initiate any action to address or otherwise resolve the boundary, title and expropriation issues created by their trespass. (Addendum C at ¶ 29.) As a result, the Gallegos had no choice but to retain counsel and bring this action for trespass and quiet title against the Lloyds to resolve the boundary encroachment, adjust the property boundaries, obtain recompense for the taking and otherwise render their lot usable and marketable. (Id.)

Although the Lloyds correctly assert that they did not contest their physical encroachment onto Lot 102, they did contest the intentional element of the Gallegos' trespass claim. (Addendum C.)[3] Indeed, the Lloyds' defense to this action was that they were unaware of their encroachment at the time they constructed their home on a portion of Lot 102. (Id. at ¶¶ 9 and 14.) In support of their defense, the Lloyds testified that they were unaware that the construction of their home was not proceeding according to their approved site plan, and that they relied on other professionals to properly stake their home and notify them that their home was not located according to the approved site plan. (Id.)

Following a two-day bench trial on June 27 and 28, 2006, the trial court found that the Lloyds' committed the intentional tort of trespass and awarded the Gallegos damages. (See id.) The trial court also awarded the Gallegos their attorney's fees as consequential damages and/or under Utah Code Ann. § 78-27-56. (Id.) In awarding the Gallegos' attorney's fees as consequential damages, the court reasoned that as a direct consequence of the Lloyds' trespass and subsequent failure

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[3] Unfortunately, the Gallegos are unable to cite to trial testimony because the Lloyds failed to order a transcript of any trial testimony for purposes of this appeal. (See R. at 393). Thus, the Gallegos cite to the trial court's Findings of Fact and Conclusions of Law at Addendum C for the appropriate inferences of the Lloyds' defense and testimony at trial.

to do anything to address or resolve their trespass, the Gallegos were required to obtain legal counsel and pursue this action in order to resolve the boundary encroachment, adjust the lot boundaries, and render their lot usable and marketable. (Addendum C at ¶ 29.)

The trial court supported its award of attorney's fees under § 78-27-56 with detailed findings of fact. (Id. at 29.) Specifically, the trial court found: (1) that the Lloyds' defense of the action was without merit (Id. at ¶ 29) because their assertions that they were unaware that their home was constructed on the Gallegos' property and that they relied on other professionals to ensure that they were constructing their home in the proper location, were not credible (Id. at ¶ 14); and (2) the Lloyds' failed to act in good faith in their defense of the action because they lacked an honest belief in the propriety of their actions (Id. at ¶ 29) in defending the case by testifying falsely. (Id. at ¶ 14). The court reached this conclusion by finding that the physical markers and topography of the site were such that it was essentially impossible for a sentient being to not realize that the house was being built contrary to the official site plan approved by Salt Lake County. (Id. at ¶ 15.) Specifically, the court found:

> There were several physical markers required by the Lot 106 Site Plan which never materialized during the

> construction of the Lloyds' home. These markers included: 1) the presence of a 12 to 14 foot high embankment on the west side of the Lloyd Home; 2) the presence of two large retaining walls on both the west and east side of the driveway; and 3) an average grade on the driveway of 8.5% with a maximum grade of 10%. The absence of these markers provided unmistakable notice to the Lloyds that their home was being constructed in the wrong location.
>
> The Lloyds were negligent in going forward with the construction of their home as staked because the Lloyds knew, or should have known, that the staking and subsequent construction of their home violated the requirements of the Lot 106 Site Plan.
>
> The Lloyds disregarded the requirements of the Lot 106 Site Plan to their considerable advantage.
>
> Motive existed for the Lloyds to ignore the requirements of the Lot 106 Site Plan. This motive included: 1) avoiding increased excavation costs associated with the excavation required by the Lot 106 Site Plan; 2) an improved view with southern exposure; and 3) constructing a relatively flat driveway rather than the average 8.5% slope contemplated by the Lot 106 Site Plan.

(Addendum C at ¶¶ 15-18.)

Subsequent to trial, during the hearing on the Gallegos' Motion for Attorney's Fees and Establishment of Costs on November 2, 2006, the trial court affirmed its initial findings supporting its award of attorney's fees. (See Addendum D; R. at 370-372.) Specifically, in support of its award of attorney's fees under

§ 78-27-56, the court stated that "[Mr. Lloyd's] conduct after litigation commenced was also in bad faith as evidenced in part by the fact that he came to court and testified, in my opinion, totally without credibility." (Addendum D at p. 35.) In support of its award of attorney's fees as consequential damages, the trial court stated that

> [i]t was entirely foreseeable that Mr. Lloyd's conduct would necessitate at least some attorney's involvement and as time went on it became more and more evident, it seems to me, that there would be substantial attorney's involvement, and I don't see a good faith effort on behalf of the Lloyds to resolve the matter either earlier or even now.

(Addendum D at 36).

SUMMARY OF ARGUMENT

I. The trial court correctly awarded attorney's fees under Utah Code Ann. § 78-27-56. The trial court made specific factual findings following trial, and during the hearing on the Gallegos' Motion for Attorney's Fees, that the Lloyds' defense of the action was without merit and asserted in bad faith. In support of its legal conclusion that the Lloyds' defense was without merit, the court made specific factual findings that the Lloyds' testified totally without credibility in their defense. In support of the court's factual finding of bad faith, the trial court made the specific finding that the Lloyds lacked an honest belief in the propriety of their

actions in defending the case in part by testifying falsely at trial. The trial court's legal conclusions are correctly supported by its findings of fact. Further, the trial court's findings concluding are well-supported in the evidence and are not clearly erroneous. Foremost, Plaintiffs failed to marshal the evidence regarding the trial court's findings of facts that the Lloyds' trial testimony was not credible. Indeed, the Lloyds failed to order a transcript of the trial testimony in the case, let alone present that testimony for this Court's consideration.

II. The trial court correctly awarded attorney's fees as consequential damages. As a direct consequence of the Lloyds' trespass and their subsequent failure to address or otherwise resolve their trespass, the Gallegos were required to retain legal counsel and pursue this action in order to resolve the boundary adjustment, adjust the lot boundaries, and render their lot useable and marketable. This circumstance is not unlike the situation where title to real property conveyed by warranty deed is encumbered and the grantee has to incur fees to remove the encumbrance and quiet title. Utah courts have long allowed recovery of attorney's fees in such a circumstance, reasoning that they—as in this case—constitute a necessary cost incurred to render their property marketable and free from defects.

ARGUMENT

The instant appeal provides this Court with the unique opportunity to affirm a trial court's well-reasoned award of attorney's fees correctly supported by specific and undisputed findings of fact under Utah Code Ann. § 78-27-56(1) or as consequential damages of the tort of trespass.

The Lloyds' attempted to defend this case by testifying that, despite the significant and obvious deviations from their approved site plan, they were unaware that the construction of their home was not proceeding according to the site plan and/or that they relied on other professionals to notify them that they might be building their home in the wrong place, namely, on the Gallegos' ideal flat, hilltop property. Not surprisingly, the trial court expressly found the facts to be completely inconsistent with the Lloyds' testimony, and that the Lloyds knew or should have known that they were building their home in the wrong place. As a result, the court expressly found the Lloyds' testimony to be totally without credibility.

Based on these findings of fact, the trial court specifically found that the Lloyds' defense of the case was without merit and asserted in bad faith, and correctly awarded attorney's fees under Utah Code Ann. § 78-27-56(1). Significantly, in contesting the trial court's award of fees, the Lloyds failed to

marshal a scintilla of evidence to challenge the court's findings of fact upon which its award is based. Accordingly, this Court should summarily affirm the trial court's findings of fact, and the award of attorney's fees correctly supported by those findings.

In addition, the trial court found that as a direct consequence of the Lloyds' trespass and their subsequent failure to address or otherwise resolve their trespass, the Gallegos were required to retain legal counsel and pursue this action in order to render their property marketable. Although there is an absence of authority awarding attorney's fees as consequential damages of the tort of trespass, this case presents this Court with the ideal factual context in which to eliminate the tort/contract distinction. This case is analogous to the situation where title to real property conveyed by warranty deed is encumbered and the grantee has to incur fees to remove the encumbrance and quiet title. Utah courts have routinely allowed recovery of attorney's fees in this situation, reasoning that they—as the trial court did in this case—constitute a necessary cost incurred to render their property marketable and free from defects. Thus, this case presents this Court with the unique opportunity to affirm the trial court's award attorney's fees as consequential damages to the tort of trespass under a longstanding real property doctrine.

I. THE TRIAL COURT CORRECTLY AWARDED ATTORNEY'S FEES UNDER § 78-27-56 BY SPECIFICALLY FINDING THAT THE LLOYDS' DEFENSE WAS WITHOUT MERIT AND ASSERTED IN BAD FAITH.

Utah Code Ann. § 78-27-56(1) provides:

> [i]n civil actions, the court shall award reasonable attorney's fees to a prevailing party if the court determines that the action or defense to the action was without merit and not brought or asserted in good faith...

Utah Code Ann. § 78-27-56(1) (1988) ("§ 78-27-56"). Section 78-27-56 establishes a two-part test to determine whether attorney's fees should be awarded to a prevailing party in a civil action. Valcarce v. Fitzgerald, 961 P.2d 305, 315 (Utah 1998). A trial court may award a prevailing party attorney's fees if it determines that the defense to the action was (1) without merit, and (2) not asserted in good faith. Id. Further, "if the court finds both elements of the statute, then it has no discretion and must award reasonable attorney fees to the prevailing party." Watkiss & Campbell v. Foa & Son, 808 P.2d 1061, 1068 (Utah 1991).

In the instant case, the trial court correctly awarded the Gallegos their attorney's fees under § 78-27-56. The trial court supported its award of attorney's fees by making specific and express findings that mirror the two-part test outlined in § 78-27-56. (Addendum C at ¶¶ 14-29.) Indeed, the court specifically found that the Lloyds' defense of this action was (1) without merit, and (2) not asserted

in good faith. (Addendum C at ¶ 29.) The court further supported these findings with specific findings of fact, notably, that the Lloyds' testimony in their defense was not credible and that they lacked an honest belief in the propriety of their actions in defending against the Gallegos' claims. (Id. at ¶¶ 14 and 29.) Accordingly, this Court should affirm the trial court's award of attorney's fees under § 78-27-56(1).

A. The Trial Court Correctly Determined that the Lloyds' Defense Was Asserted in Bad Faith.

It is largely a factual matter for the trial court to determine whether an action was defended in bad faith and, thus, this determination is reviewed under a clearly erroneous standard. Warner v. DMG Color, Inc., 2000 UT 102, ¶ 21, 20 P.3d 868. In addition, given the factual nature of a court's determination that an action was defended in bad faith, a party challenging such a finding is required to marshal the evidence under Rule 24(a)(9) of the Utah Rules of Appellate Procedure. Valcarce, 961 P.2d at 315-316; Utah R. App. P. 24(a)(9).

In challenging the trial court's finding that the Lloyds' asserted their defense in bad faith, the Lloyds' attempt to convert the factual determination of bad faith into a legal determination by arguing that the trial court misconstrued § 78-27-56 to exclusively punish the Lloyds' pre-litigation conduct. (Lloyds' Br. at 21-24.)

Specifically, the Lloyds assert that "the trial court made no findings as to the conduct of Lloyds within the litigation other than stating that it found Mr. Lloyd's testimony "not credible." (Lloyds' Br. at 21-22.) The Lloyds' transparent attempt to convert a well-established question of fact into a question of law—and avoid the attendant burdens associated with challenging the trial court's findings of fact—should be rejected.

1. The Trial Court's Finding of Bad Faith is Based on the Lloyds' Conduct During Litigation.

For purposes of § 78-27-56, a finding of a lack of good faith is synonymous with a finding of bad faith. See Cady v. Johnson, 671 P.2d 149, 151-152 (Utah 1983). In the instant case, the trial court found that:

> the Lloyds failed to act in good faith in their defense of this action. In particular, the Lloyds lacked an honest belief in the propriety of their actions and, ultimately, took advantage of Plaintiffs' property rights of which they knew or should have known.

(Addendum C at ¶ 29) (emphasis added). This clear and unambiguous language reveals that the trial court specifically found that the Lloyds' asserted their defense in bad faith. See Cady, 671 P.2d at 151-152. This finding is, without question, based on the Lloyds' conduct during the litigation.

Further, as the Lloyds acknowledge, the trial court found that their testimony—not just Mr. Lloyd's—was incredible. (Lloyds' Br. at 21-22.) The Lloyds' defense to this action was that they were unaware of their encroachment at the time they constructed their home on a portion of the Gallegos' lot.[4] (Addendum C at ¶¶ 14-18.) In support of this defense, the Lloyds testified at trial that they were unaware that the construction of their home was not proceeding according to their approved site plan, and that they relied on other professionals to properly stake their home and notify them that their home was not located according to the approved site plan. (Id. at ¶ 14.) The trial court, however, specifically found:

> [T]he Lloyd's assertion that they were unaware of the fact that the construction of their home was not proceeding according to the Lot 106 Site Plan and, hence, that they were not aware of any potential encroachment onto Lot 102, is not credible. Likewise, the Lloyd's assertion that they relied upon other professionals to properly stake

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[4] Interestingly, in their filings below, the Lloyds' acknowledge they committed the intentional tort of trespass upon "discovering" the trespass "very early" in the litigation. (R. at 270.) This assertion (i.e., that they admitted the trespass) is contradicted by their own contention that they "discovered" their intentional tort some eight years after they had committed it, and their defense that they were unaware that they were building their home in the wrong place, namely, on the Gallegos' property. Trespass is an intentional tort which means you know what you were doing when you did it. One cannot logically admit to an intentional tort and then concurrently argue that they "discovered" it eight years later. The assertion is nonsensical.

> their home or notify them that their home was not located according to the Lot 106 Site Plan, is not credible.

(Addendum C at ¶ 14.)

Although they obliquely acknowledge this finding, the Lloyds attempt to dilute its import by arguing that "[i]n virtually every litigation there will be a requirement that the court find one version of the facts as given by one side more credible than the other" and "[t]hat this finding has never been held sufficient by itself to uphold an award of attorneys [sic] fees under Section 78-27-56." (Lloyds' Br. at 21-22.) The Lloyds fail to appreciate the difference between a trial court's finding that one party's testimony is more credible than another, and a trial court's finding that a party's testimony is not credible at all.

In the instant case, the trial court did not merely find that the Lloyds' testimony was less credible than the Gallegos', it found that the Lloyds' testimony was "not credible." (Addendum C at ¶ 14.) In other words, the trial court determined that the Lloyds testified falsely in their defense. See Valcarce, 961 P.2d at 315. Moreover, contrary to the Lloyds' assertion, Utah courts have long held that a finding that a party has testified falsely in an attempt to avoid liability

compels the award of attorney's fees under § 78-27-56. See id.; see also Topik v. Thurber, 739 P.2d 1101, 1104 (Utah 1987).[5]

In addition, during the hearing on the Gallegos' Motion for Attorney's Fees, counsel for the Lloyds asserted the very argument they present on appeal, namely, that the trial court's finding of bad faith was based on the Lloyds' pre-litigation conduct, not their conduct in defending the case. (See Addendum D at pp. 9-37.) In response to this argument, the trial court made clear that:

> There are, at least, two bases for awarding fees in this case. One is the statutory basis and I think that not only was Mr. Lloyd's conduct before the litigation commenced in bad faith, but I think his conduct after the litigation commenced was also in bad faith as evidenced in part by the fact that he came to court and testified, in my opinion, totally without credibility . . . I did feel that the evidence rose to a preponderance level and that would be adequate in my opinion, given his post-commencement of litigation conduct that I think would justify the award of damages for bad faith in the litigation process.
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> So I feel that the bad faith is evidenced both before and after the commencement of the litigation.

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[5] In Topik, the court's findings of bad faith and meritless defense in support of its award of attorney's fees under § 78-27-56 were both based on the party's attempt to avoid liability by testifying falsely. See Topik, 739 P.2d at 1104. This reasoning is sound because if a party testifies falsely in her defense, there is necessarily an absence of facts to support her defense, and the determination that she testified falsely is evidence that she lacked an honest belief in the propriety of her actions in testifying. (See §§ I. A. 3. through B. infra.) Indeed, parties testifying falsely in their defense is ostensibly the precise conduct that § 78-27-56 was designed to punish.

(Addendum D at p. 35) (emphasis added). The court's findings both at trial and during the hearing on the motion for attorney's fees negate the Lloyds' assertion that the trial court misconstrued § 78-27-56 to exclusively punish the Lloyds' pre-litigation conduct.

Given the trial court's express findings of fact that the Lloyds asserted their defense in bad faith and that they testified falsely in their defense, the remaining seminal question is whether these factual determinations are clearly erroneous. See Warner, 2000 UT 102 at ¶ 21. The Lloyds' failure to meet their burden to order a transcript and marshal the evidence to protest these findings of fact, however, renders the answer to this question academic.

2. The Lloyds' Failure to Marshal the Evidence Compels Affirming the Trial Court's Finding that They Asserted Their Defense in Bad Faith.

When challenging a finding of fact, this Court will generally not address the challenge unless the appellant has properly "marshaled the evidence." Utah R. App. P. 24(a)(9); United Park City Mines Co. v Stichting Mayflower Mountain Fonds, 2006 UT 35, ¶ 24, 140 P.3d 1200; State v. Benvenuto, 1999 UT 60, ¶ 13, 983 P.2d 556; Child v. Gonda, 972 P.2d 425, 433-34 (Utah 1998). Specifically, in order to adequately challenge a finding of fact, the challenging party must "marshal all the *supporting* evidence and demonstrate its insufficiency." Utah Dept.

of Social Services v. Adams, 806 P.2d 1193, 1197 (Utah Ct. App. 1991) (citation omitted) (emphasis original). The marshaling requirement "serves the important function of reminding litigants and appellate courts of the broad deference owed to the fact finder at trial." Woodward v. Fazzio, 823 P.2d 474, 477 (Utah Ct. App. 1991); accord State v. Moore, 802 P.2d 732, 739 (Utah Ct. App. 1990). Further, marshaling "provides the appellate court the basis from which to conduct a meaningful and expedient review of facts challenged on appeal." Robb v. Anderton, 863 P.2d 1322, 1328 (Utah Ct. App. 1993).

The "insistence on compliance with the marshaling requirement is not a case of exalting hypertechnical adherence to form over substance." State v. Larsen, 828 P.2d 487, 491 (Utah Ct. App. 1992), aff'd, 865 P.2d 1355 (Utah 1993). "[A] reviewing court is entitled to have the issues clearly defined with pertinent authority cited and is not simply a depository in which the appealing party may dump the burden of argument and research." Id. Further, when a party fails to perform the critical task of marshaling the evidence, this Court "can rely on that failure to affirm the lower court's findings of fact." United Park City Mines Co., 2006 UT 35 at ¶ 27.

The trial court's finding that the Lloyds asserted their defense in bad faith is a factual determination by the court which invokes the marshaling requirement.

Valcarce, 961 P.2d at 315-316; Utah R. App. P. 24(a)(9). The Lloyds utterly failed, however, to marshal a scintilla—let alone all—of the evidence supporting the trial court's determination that they asserted their defense in bad faith. (See Lloyds' Br. at § II.) In addition, although the Lloyds' acknowledge that the trial court found their testimony to be incredible (Id. at 21-22), they failed to even order a transcript of the testimony presented at trial—the very evidence on which the court's finding of bad faith is based. (R. at 393.)[6] Consequently, with no transcript before it, this court is bound to presume that the findings are supported by adequate, competent evidence. Smith v. Vuicich, 699 P.2d 763, 765 (Utah 1985); Sampson v. Richins, 770 P.2d 998, 1002 (UT App. 1989).

The Lloyds have failed to properly marshal any, let alone all, of the evidence supporting the trial court's finding of bad faith, or the underlying findings of fact that they lacked an honest belief in the propriety of their actions in defending the case by testifying falsely at trial. Accordingly, this Court should summarily affirm the trial court's finding of bad faith. See United Park City Mines Co., 2006 UT 35

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[6] Indeed, a review of the Lloyds' Request for Transcript reveals that the Lloyds limited their request to only a portion of the trial court's ruling following trial, and the hearing on the Gallegos' Motion for Attorney's Fees and Establishment of Costs. (See R. at 393).

at ¶ 27; Valcarce, 961 P.2d at 312; Benvenuto, 1999 UT at ¶ 13; Young v. Young, 979 P.2d 338, 345 (Utah 1999).

3. The Trial Court's Finding of Bad Faith is Well-Supported in the Record and is Not Clearly Erroneous.

To find that a party acted in bad faith, the trial court must find that one or more of the following factors existed: (1) the party lacked an honest belief in the propriety of their actions; (2) the party intended to take unconscionable advantage of others; or (3) the party intended to or acted with the knowledge that the activities in question would hinder, delay or defraud others. Valcarce, 961 P.2d at 316; citing Cady, 671 P.2d at 151.

In addition to its findings that the Lloyds' testimony was not credible, the trial court made express findings supporting its finding of bad faith. (See Addendum C at ¶¶14-18 and 29). Specifically, the trial court found that:

> the Lloyds failed to act in good faith in their defense of this action. In particular, the Lloyds lacked an honest belief in the propriety of their actions and, ultimately, took advantage of Plaintiffs' property rights of which they knew or should have known.

(Id. at ¶ 29) (emphasis added). This plain language reveals that the trial court expressly found at least one of the Cady factors, namely, that the Lloyds lacked an

honest belief in the propriety of their actions in defending this case. See Cady, 671 P.2d at 151. The court's finding of bad faith is supported by this finding alone.[7]

In addition, the trial court made further findings supporting its finding that the Lloyds lacked an honest belief in the propriety of their testimony. (See Addendum C at ¶¶ 14-18). Specifically, that the Lloyds knew that they were testifying falsely in their defense. In this regard, the trial court found:

> [t]he Lloyds were negligent in going forward with the construction of their home as staked because the Lloyds knew, or should have known, that the staking and subsequent construction of their home violated the requirements of the Lot 106 Site Plan.
>
> The Lloyds disregarded the requirements of the Lot 106 Site Plan to their considerable advantage.
>
> Motive existed for the Lloyds to ignore the requirements of the Lot 106 Site Plan. This motive included: 1) avoiding increased excavation costs associated with the excavation required by the Lot 106 Site Plan; 2) an improved view with southern exposure; and 3) constructing a relatively flat driveway rather than the

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[7] As with the trial court's findings of fact that the Lloyds asserted their defense in bad faith and that they testified falsely in their defense, the Lloyds failed to marshal the evidence to challenge the trial court's finding of fact that they lacked an honest belief in the propriety of their actions in defending the case. (See Lloyds' Br.) Thus, this Court should affirm the trial court's finding of this Cady indicator of bad faith. See United Park City Mines Co., 2006 UT 35 at ¶ 27; Valcarce, 961 P.2d at 312; Benvenuto, 1999 UT at ¶ 13; Young v. Young, 979 P.2d 338, 345 (Utah 1999).

average 8.5% slope contemplated by the Lot 106 Site Plan.

(Addendum C at ¶¶ 16-18) (emphasis added). These findings, coupled with the court's findings that the Lloyds testified falsely in their defense and, hence, lacked an honest belief in the propriety of their actions in defending the case, demonstrates that the trial court's finding of bad faith is well supported in the record and not clearly erroneous.

B. The Trial Court Correctly Determined that the Lloyd's Defense was Without Merit.

1. The Lloyds' Defense is Void of Any Basis in Fact.

A defense is without merit for purposes of § 78-27-56 if it is "of little weight or importance having no basis in law or fact." Warner v. DMG Color, Inc., 2000 UT 102, ¶ 22, 20 P.3d 868 (citing Cady, 671 P.2d at 151) (emphasis added). The trial court correctly concluded that the Lloyds' defense was without merit because it is void of any basis in fact.

The Lloyds' defense to this action was that they were unaware of their encroachment at the time they constructed their home on a portion of the Gallegos' lot because they were unaware that the construction of their home was not proceeding according to the site plan approved by Salt Lake County. (Addendum C at ¶ 14.) After hearing the testimony and considering the evidence presented at

trial, the trial court found that the physical markers and topography of the Lloyds' building site were such that it was essentially impossible for a sentient being to not realize that the house was being built contrary to the official site plan approved by Salt Lake County. (Addendum C at ¶¶ 15-18.) Specifically, the court found:

> [t]here were several physical markers required by the Lot 106 Site Plan which never materialized during the construction of the Lloyd's home. These markers included: 1) the presence of a 12 to 14 foot high embankment on the west side of the Lloyd Home; 2) the presence of two large retaining walls on both the west and east side of the driveway; and 3) an average grade on the driveway of 8.5% with a maximum grade of 10%. The absence of these markers provided unmistakable notice to the Lloyd's that their home was being constructed in the wrong location.

(Addendum C at ¶ 15) (emphasis added). In other words, there is absolutely no basis in fact for the Lloyds' defense that they were unaware that the construction of their house was not proceeding in the correct location as defined by the Salt Lake County approved site plan.[8] Accordingly, the trial court correctly determined that the Lloyds' defense of this action was without merit because it was void of any basis in fact. Warner, 2000 UT 102 at ¶ 22. Indeed, the absence of facts in

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[8] In their brief, the Lloyds assert that their "defenses were based on facts in the record." (Lloyds' Br. at 18.) The Lloyds, however, fail to cite to any facts in the record in support their defense. (See Lloyds' Br.) This failure is telling of the lack of any factual basis in the record for the Lloyds' defense of this action.

support of their defense necessarily required the Lloyds to testify falsely in order to fabricate a defense.

2. The Lloyds Testified Falsely in Their Defense.

Testifying falsely "is not a legitimate mode of defense" and supports a finding that a defense is without merit. Valcarce, 961 P.2d at 315. Indeed, the Utah Supreme Court has made clear that "a finding that a party has attempted to avoid liability by testifying falsely will support a decision to award attorney fees if combined with a finding of bad faith." Id. (citing Topik, 739 P.2d at 1104).

In Valcarce, the counter claim plaintiff alleged that the counterclaim defendant, Mr. Valcarce, damaged an irrigation canal and a series of damming devices on the canal. Id. at 310. In response, Mr. Valcarce testified at trial that he did not damage the irrigation canal or its dams. Id. The trial court, however, "found his testimony to be 'incredible' and concluded that Paul Valcarce did indeed damage the canal." Id. Based on this finding, the Supreme Court concluded that the trial court correctly determined that Mr. Valcarce's defense of the case was without merit. Id.; see also Topik, 739 P.2d at 1104 (holding trial court correctly awarded attorney's fees under § 78-27-56 because the defendant attempted to avoid liability by testifying falsely).

In the instant case, the trial court correctly determined that the Lloyds' defense of the case was without merit because the court specifically found—as in Valcarce—that the Lloyds' testimony in support of their defense was incredible. (Addendum C at ¶ 14.) In support of their defense, the Lloyds testified that they were unaware that the construction of their home was not proceeding according to their approved site plan, and that they relied on other professionals to properly stake their home and notify them that their home was not located according to the approved site plan. (Addendum C at ¶ 14.)

The trial court, however, specifically found:

> [t]he Lloyd's assertion that they were unaware of the fact that the construction of their home was not proceeding according to the Lot 106 Site Plan and, hence, that they were not aware of any potential encroachment onto Lot 102, is not credible. Likewise, the Lloyd's assertion that they relied upon other professionals to properly stake their home or notify them that their home was not located according to the Lot 106 Site Plan, is not credible.

(Id.) (emphasis added). The trial court further found during the hearing on the Gallegos' Motion for Attorney's Fees that Mr. Lloyd came into court "and testified, in my opinion, totally without credibility." (Addendum D at p. 35) (emphasis added). Thus, under Valcarce, the trial court correctly determined that the Lloyds'

defense was without merit because they attempted to avoid liability by testifying falsely.[9] See Valcarce, 961 P.2d at 315.

The Lloyds contend that their defense cannot be deemed without merit because the "trial court reduced the amount of actual damages claimed by Gallegos by more than forty percent and completely dismissed the Gallegos' claim for punitive damages." (Lloyd's Br. at 18.) In support of this contention, the Lloyds rely heavily on MiVida Enterprises v. Steen-Adams, et al., 2005 UT App 400, 122 P.3d 144. This reliance, however, is misplaced.

In MiVida, this court reversed the award of attorney's fees under § 78-27-56 because there was insufficient evidence to support a finding of bad faith to satisfy the second prong of the statutory test. Id. at ¶ 18. In reaching this conclusion, the Court specifically noted that "[b]ecause we determine that bad faith was lacking in this case, we need not address whether the Colorado action was without merit." Id. at ¶ 18, n. 7. Thus, the case hardly stands for the proposition that a reduction in damages claims negates a trial court's finding of a meritless defense under § 78-27-56, because the Court never addressed the issue.

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[9] Although the Lloyds failed to challenge the trial court's finding that they testified falsely in their defense, even if they had, as established in § I. A. 2. supra, the Lloyds failed to meet their burden to marshal the evidence in support of such a challenge. See § I. A. 2. supra.

Instead of referring to an analysis under § 78-27-56, the Lloyds' reliance on MiVida centers on a strained reading of the Court's ruling under Rule 33 of the Utah Rules of Appellate Procedure. Specifically, the Lloyds' attempt to equate a trial court's finding of a meritless defense under § 78-27-56 with a determination of whether an appeal is frivolous under Rule 33 of the Utah Rules of Appellate Procedure. (Lloyd's Br. at 19.) The Lloyds, however, fail to cite to any authority, from Utah or elsewhere, that supports the proposition that a determination that a defense is without merit under § 78-27-56 is analogous to a determination that an appeal is frivolous under Rule 33; no such authority exists. (See Lloyds' Br. at § II.)

Indeed, the applicable authority in Utah regarding the award of attorney's fees under § 78-27-56 stands for the exact opposite proposition: although a defendant may prevail on some claims, this success does not negate a trail court's finding that the defense was without merit under § 78-27-56. In Coalville City v. Lundgren, 930 P.2d 1206, 1211 (Utah Ct. App. 1997), this Court specifically held that the "[d]efendant's measure of success on a collateral issue does not preclude an assessment of bad faith attorney fees" under § 78-27-56; see also Topik, 739 P.2d at 1104 (upholding attorney fees award under § 78-27-56 against defendant where "defense was partially in bad faith" because defendant testified falsely about one of

several defenses). This Court's holding in Coalville City is also in accord with other jurisdictions' holdings under similar statutes. See e.g., Wean Water, Inc. v. Sta-Rite Indus., Inc., 686 P.2d 1285, 1287 (Ariz. Ct. App. 1984) (upholding attorney's fees award under similar bad faith statute where plaintiff's technical success on breach of contract claim did not negate groundless fraud claim made in bad faith).

In summary, the trial court held that the Lloyds' defense of the case was without merit because the Lloyds took the stand and testified falsely in an effort to convince the trial court that construction of their home on the Gallegos' lot was an innocent mistake resulting from the conduct of a deceased, hapless and underpaid surveyor. The trial court specifically found this testimony totally incredible, and the attempt to claim ignorance and blame others, without merit. In addition, the Lloyds did not even attempt to challenge the trial court's findings of fact which directly support its conclusion that the Lloyds' defense of the case was without merit. Thus, under Valcarce, the trial court's determination that the Lloyds' defense was without merit follows *a fortiori* from its finding of fact that their testimony was not credible.

II. THE TRIAL COURT CORRECTLY AWARDED ATTORNEY'S FEES AS CONSEQUENTIAL DAMAGES.

The Gallegos are well aware of the limitations of Utah law regarding recovery of attorneys fees as damage in tort cases. It is for this reason that counsel suggested the alternative statutory basis to support the award at the time the trial court was issuing its ruling. (Addendum D at p. 7.) Nevertheless, this case presents a compelling circumstance for allowing recovery of fees as an element of damage because without initiation and prosecution of this action, the Gallegos' property would have remained wholly unmarketable indefinitely. (Addendum C at ¶¶ 24 and 27.)

As the trial court found, "the Lloyds initiated no action to address or resolve their trespass." (Id. at ¶ 29.) The trial court further found that:

> [a]s a direct consequence of the actions and/or omissions of the Lloyds, the Gallegos were required to obtain counsel and pursue this action in order to resolve the boundary encroachment, adjust the lot boundaries, and render Lot 102 usable and marketable.

(Id.)

This circumstance is not unlike the situation where title to real property conveyed by warranty deed is encumbered and the grantee has to incur fees to remove the encumbrance and quiet title. Utah courts have long allowed recovery

of attorneys fees in such a circumstance, reasoning that they constitute a necessary cost incurred to render their property marketable and free from defects. Van Cott v. Jacklin, 63 Utah 412, 422, 236 P. 460, 463-64 (1924); Creason v. Peterson, 24 Utah 2d 305, 470 P.2d 403 (1970); Holmes Dev. Co., LLC v. Cook, 2002 UT 38, ¶ 39, 48 P.3d 895.

From a logical standpoint, it is difficult to rationalize allowing an award in the deed context and deny that same award where the damage is real and comparable in both instances and the only difference is the hoary dichotomy of tort vs. contract. This case is an appropriate vehicle for the court to move beyond the tort/contract distinction and allow recovery of fees where the defendants' conduct requires the expenditure of fees to remedy a title problem which renders plaintiffs' real property unmarketable.

The Gallegos request their attorney's fees and costs associated with the instant appeal.

It is well-established that "when a party who received attorney fees below prevails on appeal, the party is also entitled to fees reasonably incurred on appeal." Pearson v. Lamb, 2005 UT App 383, ¶ 15, 121 P.3d 717; see also Valcarce, 961 P.2d at 319; Utah Dept. of Social Services, 806 P.2d at 1197. "Moreover, an appeal brought from an action which is properly determined to be in bad faith is

necessarily frivolous under Utah R. App. P. 33." Utah Dept. of Social Services, 806 P.2d at 1197.

In the instant case, the trial court correctly awarded attorney's fees under § 78-27-56 and as consequential damages of the Lloyds' trespass. In addition, in support of its award of fees under § 78-27-56, the trial court properly determined that the Lloyds acted in bad faith in their defense of this action. (See Addendum C at ¶ 29). Indeed, the Lloyds wholly failed to properly challenge the finding of bad faith, or the findings of fact upon which the bad faith determination was premised. (See Lloyds' Br. at § II). Accordingly, the Gallegos hereby request their attorney's fees and costs associated with the instant appeal pursuant to Rule 24(a)(9) of the Utah Rules of Appellate Procedure.

CONCLUSION

This case presents the "poster child" for a § 78-27-56 award of fees. When people come into our courts and testify falsely, our system of jurisprudence is threatened and sometimes malfunctions. The Gallegos believe that the sound public policy behind § 78-27-56 is a desire by the legislature to discourage and indeed punish those who enter its courts on the premise of false testimony and meritless action.

The Lloyds expropriated for their own benefit, the prime topographic feature of the Gallegos' lot, came to court and lied about it, and then quibbled over the damages and fees the Gallegos were required to incur in order to attempt to remedy the Lloyds' intentional trespass. Sound public policy and fundamental fairness dictate that the judgment below be affirmed in all respects and that the Gallegos be awarded their fees on appeal.

Respectfully submitted this 2 day of July, 2007.

WILLIAMS & HUNT

By _____
GEORGE A. HUNT

By _____
STEPHEN T. HESTER
Attorneys for Appellees Andrew Gallegos and Joan Gallegos

135374.1

CERTIFICATE OF SERVICE

I hereby certify that on the 2 day of July, 2007, I caused two (2) true and correct copies of the foregoing **BRIEF OF PLAINTIFFS/APPELLEES ANDREW AND JOAN GALLEGOS** to be mailed postage prepaid thereon, by first class mail in the United States mail, to the following:

T. Richard Davis, Esq.
CALLISTER, NEBEKER & MCCULLOUGH
Gateway Tower East, Suite 900
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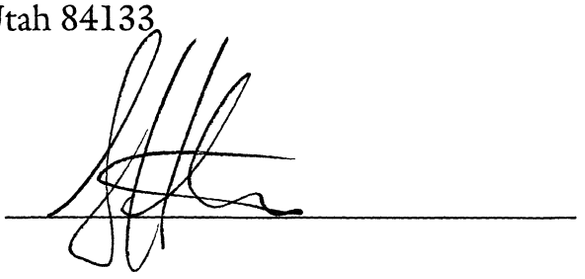
Salt Lake City, Utah 84133



Tab A

ADDENDUM A

Utah Code Ann. § 78-27-56(1)

78-27-56. Attorney's fees — Award where action or defense in bad faith — Exceptions.

(1) In civil actions, the court shall award reasonable attorney's fees to a prevailing party if the court determines that the action or defense to the action was without merit and not brought or asserted in good faith, except under Subsection (2).

(2) The court, in its discretion, may award no fees or limited fees against a party under Subsection (1), but only if the court:

(a) finds the party has filed an affidavit of impecuniosity in the action before the court; or

(b) the court enters in the record the reason for not awarding fees under the provisions of Subsection (1).

History: L. 1981, ch. 13, § 1; 1988, ch. 92, § 1.

NOTES TO DECISIONS

ANALYSIS

Appeal.

The "without merit" determination is a question of law, and therefore the appellate court will review it for correctness. Jeschke v. Willis, 811 P.2d 202 (Utah Ct. App. 1991).

A finding of bad faith is a question of fact and is reviewed by the appellate court under the "clearly erroneous" standard. Jeschke v. Willis, 811 P.2d 202 (Utah Ct. App. 1991).

—Frivolous appeal.

An appeal brought from an action which is properly determined to be in bad faith is necessarily frivolous under Utah R. App. P. 33. Utah Dep't of Social Servs. v. Adams, 806 P.2d 1193 (Utah Ct. App. 1991).

Award.

—Distinguishing between fees.

An award of attorney fees must distinguish between those fees incurred in connection with successful and unsuccessful claims, as must the evidence submitted by the prevailing party, or the reviewing court will be precluded from making an independent determination. Valcarce v. Fitzgerald, 961 P.2d 305 (Utah 1998).

Discretion of court.

It is within the trial court's discretion to determine bad faith under this section. Canyon Country Store v. Bracey, 781 P.2d 414 (Utah 1989).

An award of attorney fees premised on a finding of bad faith is, to an extent, a matter within the discretion of the trial court, and appellate deference is owed to the trial judge who actually presided over the proceeding and has first-hand familiarity with the litigation. Utah Dep't of Social Servs. v. Adams, 806 P.2d 1193 (Utah Ct. App. 1991).

Essential elements.

This section clearly states that the court shall award attorney fees to the prevailing party only if it determines (1) that the action is without merit and (2) that the action was brought in bad faith. If the court finds both elements of the statute, then it has no discretion and must award reasonable attorney fees to the prevailing party. Watkiss & Campbell v. Foa & Son, 808 P.2d 1061 (Utah 1991).

Three requirements must be met before the court shall award attorney fees: (1) the party must prevail, (2) the claim asserted by the opposing party must have been without merit, and (3) the claim must not have been brought or asserted in good faith. Hermes Assocs. v. Park's Sportsman, 813 P.2d 1221 (Utah Ct. App. 1991).

Fees properly awarded.

Where defendant's pattern of ignoring court orders caused plaintiff to take legal action on several occasions to force defendant's compliance, plaintiff was properly awarded attorney fees. Coalville City v. Lundgren, 930 P.2d 1206 (Utah Ct. App. 1997), cert. denied, 939 P.2d 683 (Utah 1997).

Trial court did not err in awarding attorney fees based on findings that plaintiffs' claims and defenses were without merit because the facts were contrary to evidence and bad faith was shown by plaintiffs' pursuit of claims having no other apparent reason than to harass defendants and drive up the costs of litigation. Valcarce v. Fitzgerald, 961 P.2d 305 (Utah 1998).

An award of attorney fees was appropriate where plaintiff's action in the trial court had no basis in law, and thus was without merit. Warner v. DMG Color, Inc., 2000 UT 102, 20 P.3d 868.

Fees properly denied.

Because, absent a voluntary agreement between the disputing parties, a quiet title action is the only legally binding way to settle a boundary dispute and because it could not be said that landowner acted in bad faith by refusing to sign quitclaim deed sent by attorney retained by adjacent land owners until after the adjacent landowners had filed suit, trial court's denial of adjacent landowners' claim for attorney fees under this section was proper. Chipman v. Miller, 934 P.2d 1158 (Utah Ct. App. 1997).

Defendant's request for attorney fees was denied where plaintiff's claims were not shown to be without merit and not brought in bad faith, and defendants failed to marshal the evidence regarding bad faith. Wardley Better Homes & Garden v. Cannon, 2001 UT App 48, 21 P.3d 235.

Findings.

Under this section, a trial court must make findings that: (1) the claim or claims were "without merit," and (2) the party did not act in good faith. Amica Mut. Ins. Co. v. Schettler, 768 P.2d 950 (Utah Ct. App. 1989).

This section does not require written findings on the bad faith issue. If a court finds bad faith but in its discretion limits or awards no attorney fees, Subsection (2)(b) does, however, require written findings. Canyon Country Store v. Bracey, 781 P.2d 414 (Utah 1989).

Good faith by insurer.

Proof of a breach of the covenant of good faith and fair dealing by an insurer does not show the bad faith necessary for an award under this section. Canyon Country Store v. Bracey, 781 P.2d 414 (Utah 1989).

An insurer is obliged to assess the black-letter law in the jurisdiction in which the claim arises; this obligation to properly assess the law extends to the legal assertions a party and its counsel may make in litigation. Lieber v. ITT Hartford Ins. Ctr., Inc., 2000 UT 90, 15 P.3d 1030.

Hearing.

This section does not require a trial court to hold a hearing to determine if a party has been "stubbornly litigious" or if an action was without merit. Canyon County Store v. Bracey, 781 P.2d 414 (Utah 1989).

Paralegal services.

Services provided by a paralegal were properly included in the court's award of attorney's fees. Baldwin v. Burton, 850 P.2d 1188 (Utah 1993).

Quiet title action.

Although ruling was made that attorney fees are not recoverable in an undisputed quiet title action, award of attorney fees to landowners, pursuant to their counterclaim against adjacent landowners on the basis that the adjacent landowners acted in bad faith by pursuing a second cause of action for attorney fees after obtaining a quitclaim deed from landowner for the disputed property, could not be supported under either Subsection (1) of this section or Utah R. Civ. P. 11, because when adjacent landowners filed their claim there was no clear prohibition on the recovery of attorney fees in undisputed quiet title actions and finding was not made as to bad faith on part of the adjacent landowner. Chipman v. Miller, 934 P.2d 1158 (Utah Ct. App. 1997).

State of mind.

The existence of bad faith, which must be shown under this section, is a subjective question of state of mind. Canyon County Store v. Bracey, 781 P.2d 414 (Utah 1989).

"Without merit" and "good faith."

A frivolous action having no basis in law or fact is "without merit," but is nevertheless in "good faith" as long as there is an honest belief that it is appropriate, and as long as there is no intent to hinder, delay, defraud or take advantage of another. Cady v. Johnson, 671 P.2d 149 (Utah 1983).

To prove that a claim is "without merit," the party asserting an award of attorney fees must first demonstrate that the claim is "frivolous" or "of little weight or importance having no basis in law or fact." Second, the party must prove that the plaintiff's conduct in bringing the suit was lacking in good faith. Jeschke v. Willis, 811 P.2d 202 (Utah Ct. App. 1991).

There was no remand, even assuming that defendants had asserted their defense in bad faith, when nothing in the record supported a

conclusion that the defense was without merit. Broadwater v. Old Republic Sur., 854 P.2d 527 (Utah 1993).

The point at which plaintiff should have mitigated her damages is a legitimate issue that can hardly be characterized as frivolous or as having no basis in law or fact. Broadwater v. Old Republic Sur., 854 P.2d 527 (Utah 1993).

—Bad faith not found.

County's condemnation of the plaintiff's property in two separate legal actions, when the subject property was always within the scope of the original plans to build a county airport, was not done in bad faith. Board of County Comm'rs v. Ferrebee, 844 P.2d 308 (Utah 1992).

Respondent was not entitled to attorney fees on appeal where the trial court specifically found that the petitioner brought her action for modification of a divorce decree believing that she was legally entitled to some of the respondent's military retirement benefits, and the respondent did not challenge those findings. Childs v. Callahan, 993 P.2d 244 (Utah Ct. App. 1999).

Plaintiff's claim for attorney fees failed under this section because defendant offered no defense, so the court could not determine that the defense to the action was without merit. Faust v. Kai Techs., Inc., 2000 UT 82, 15 P.3d 1266.

It was not bad faith for town residents to seek judicial review after having failed in their administrative challenge to a zoning ordinance; thus, an award of attorney fees was improper. Hatch v. Boulder Town Council, 2001 UT App 55, 21 P.3d 245.

Because the trial court's grant of attorney fees was based on its finding that a claim had been pursued in bad faith, when that claim was later found to have merit, the grant of attorney fees was also reversed. Sittner v. Schriever, 2001 UT App 99, 22 P.3d 784.

Cited in Topik v. Thurber, 739 P.2d 1101 (Utah 1987); Hatanaka v. Struhs, 738 P.2d 1052 (Utah Ct. App. 1987); O'Brien v. Rush, 744 P.2d 306 (Utah Ct. App. 1987); DeBry v. Occidental/Nebraska Fed. Sav. Bank, 754 P.2d 60 (Utah 1988); Taylor v. Estate of Taylor, 770 P.2d 163 (Utah Ct. App. 1989); Cascade Energy & Metals Corp. v. Banks, 896 F.2d 1557 (10th Cir. 1990); Burns Chiropractic Clinic v. Allstate Ins. Co., 851 P.2d 1209 (Utah Ct. App. 1993); Pennington v. Allstate Ins. Co., 973 P.2d 932 (Utah 1998); Ault v. Holden, 2002 UT 33, 44 P.3d 781; Rohan v. Boseman, 2002 UT App 109, 46 P.3d 753.

COLLATERAL REFERENCES

Utah Law Review. — Attorney's Fees in Utah, 1984 Utah L. Rev. 553.

Attorney's Fees in Bad Faith, Meritless Actions, 1984 Utah L. Rev. 593.

Recent Developments in Utah Law — Legislative Enactments — Attorney's Fees, 1989 Utah L. Rev. 342.

Note, "The Negligent Infliction of Emotional Distress: A New Cause of Action in Utah," 1989 Utah L. Rev. 571.

A.L.R. — Construction and application of state statute or rule subjecting party making untrue allegations or denials to payment of costs or attorneys' fees, 68 A L.R.3d 209.

Attorneys' fees as recoverable in fraud action, 44 A.L.R.4th 776.

Attorneys' fees: obduracy as basis for state-court award, 49 A.L.R.4th 825.

Attorney's liability under state law for opposing party's counsel fees, 56 A.L.R.4th 486.

Recovery of attorneys' fees and costs of litigation incurred as result of breach of agreement not to sue, 9 A.L.R.5th 933.

Award of counsel fees to prevailing party based on adversary's bad faith, obduracy, or other misconduct, 31 A.L.R. Fed. 833.

78-27-56.5. Attorney's fees — Reciprocal rights to recover attorney's fees.

A court may award costs and attorney's fees to either party that prevails in a civil action based upon any promissory note, written contract, or other writing executed after April 28, 1986, when the provisions of the promissory note, written contract, or other writing allow at least one party to recover attorney's fees.

History: C. 1953, 78-27-56.5, enacted by L. 1986, ch. 79, § 1.

Tab l'

ADDENDUM B

Rule 24, Utah R.App.P.

UTAH CODE
ANNOTATED

1953

UTAH COURT RULES
2007

State and Federal Rules and Code of Judicial Administration

LexisNexis®
Matthew Bender & Company, Inc.

Cited in State v. Classon, 935 P.2d 524 (Utah Ct App. 1997), cert granted, 945 P2d 1118 (Utah 1997); State v. Bredehoft, 966 P2d 285 Utah Ct. App. 1998), cert. denied, 982 P2d 88 (Utah 1999), State v. Simmons, 2000 UT App 190, 398 Utah Adv. Rep. 7; State v. Mecham, 2000 UT App 247, 9 P.3d 777.

Rule 24. Briefs.

(a) *Brief of the appellant.* The brief of the appellant shall contain under appropriate headings and in the order indicated:

(a)(1) A complete list of all parties to the proceeding in the court or agency whose judgment or order is sought to be reviewed, except where the caption of the case on appeal contains the names of all such parties. The list should be set out on a separate page which appears immediately inside the cover.

(a)(2) A table of contents, including the contents of the addendum, with page references.

(a)(3) A table of authorities with cases alphabetically arranged and with parallel citations, rules, statutes and other authorities cited, with references to the pages of the brief where they are cited.

(a)(4) A brief statement showing the jurisdiction of the appellate court.

(a)(5) A statement of the issues presented for review, including for each issue: the standard of appellate review with supporting authority; and

(a)(5)(A) citation to the record showing that the issue was preserved in the trial court; or

(a)(5)(B) a statement of grounds for seeking review of an issue not preserved in the trial court.

(a)(6) Constitutional provisions, statutes, ordinances, rules, and regulations whose interpretation is determinative of the appeal or of central importance to the appeal shall be set out verbatim with the appropriate citation. If the pertinent part of the provision is lengthy, the citation alone will suffice, and the provision shall be set forth in an addendum to the brief under paragraph (11) of this rule.

(a)(7) A statement of the case. The statement shall first indicate briefly the nature of the case, the course of proceedings, and its disposition in the court below. A statement of the facts relevant to the issues presented for review shall follow. All statements of fact and references to the proceedings below shall be supported by citations to the record in accordance with paragraph (e) of this rule.

(a)(8) Summary of arguments. The summary of arguments, suitably paragraphed, shall be a succinct condensation of the arguments actually made in the body of the brief. It shall not be a mere repetition of the heading under which the argument is arranged.

(a)(9) An argument. The argument shall contain the contentions and reasons of the appellant with respect to the issues presented, including the grounds for reviewing any issue not preserved in the trial court, with citations to the authorities, statutes, and parts of the record relied on. A party challenging a fact finding must first marshal all record evidence that supports the challenged finding. A party seeking to recover attorney's fees incurred on appeal shall state the request explicitly and set forth the legal basis for such an award.

(a)(10) A short conclusion stating the precise relief sought.

(a)(11) An addendum to the brief or a statement that no addendum is necessary under this paragraph. The addendum shall be bound as part of the brief unless doing so makes the brief unreasonably thick. If the addendum is bound separately, the addendum shall contain a table of contents. The addendum shall contain a copy of:

(a)(11)(A) any constitutional provision, statute, rule, or regulation of central importance cited in the brief but not reproduced verbatim in the brief;

(a)(11)(B) in cases being reviewed on certiorari, a copy of the Court of Appeals opinion; in all cases any court opinion of central importance to the

appeal but not available to the court as part of a regularly published reporter service; and

(a)(11)(C) those parts of the record on appeal that are of central importance to the determination of the appeal, such as the challenged instructions, findings of fact and conclusions of law, memorandum decision, the transcript of the court's oral decision, or the contract or document subject to construction.

(b) *Brief of the appellee.* The brief of the appellee shall conform to the requirements of paragraph (a) of this rule, except that the appellee need not include:

(b)(1) a statement of the issues or of the case unless the appellee is dissatisfied with the statement of the appellant; or

(b)(2) an addendum, except to provide material not included in the addendum of the appellant. The appellee may refer to the addendum of the appellant.

(c) *Reply brief.* The appellant may file a brief in reply to the brief of the appellee, and if the appellee has cross-appealed, the appellee may file a brief in reply to the response of the appellant to the issues presented by the cross-appeal. Reply briefs shall be limited to answering any new matter set forth in the opposing brief. The content of the reply brief shall conform to the requirements of paragraphs (a)(2), (3), (9), and (10) of this rule. No further briefs may be filed except with leave of the appellate court.

(d) *References in briefs to parties.* Counsel will be expected in their briefs and oral arguments to keep to a minimum references to parties by such designations as "appellant" and "appellee." It promotes clarity to use the designations used in the lower court or in the agency proceedings, or the actual names of parties, or descriptive terms such as "the employee," "the injured person," "the taxpayer," etc.

(e) *References in briefs to the record.* References shall be made to the pages of the original record as paginated pursuant to Rule 11(b) or to pages of any statement of the evidence or proceedings or agreed statement prepared pursuant to Rule 11(f) or 11(g). References to pages of published depositions or transcripts shall identify the sequential number of the cover page of each volume as marked by the clerk on the bottom right corner and each separately numbered page(s) referred to within the deposition or transcript as marked by the transcriber. References to exhibits shall be made to the exhibit numbers. If reference is made to evidence the admissibility of which is in controversy, reference shall be made to the pages of the record at which the evidence was identified, offered, and received or rejected.

(f) *Length of briefs.* Except by permission of the court, principal briefs shall not exceed 50 pages, and reply briefs shall not exceed 25 pages, exclusive of pages containing the table of contents, tables of citations and any addendum containing statutes, rules, regulations, or portions of the record as required by paragraph (a) of this rule. In cases involving cross-appeals, paragraph (g) of this rule sets forth the length of briefs.

(g) *Briefs in cases involving cross-appeals.* If a cross-appeal is filed, the party first filing a notice of appeal shall be deemed the appellant, unless the parties otherwise agree or the court otherwise orders. Each party shall be entitled to file two briefs. No brief shall exceed 50 pages, and no party's briefs shall in combination exceed 75 pages.

(g)(1) The appellant shall file a Brief of Appellant, which shall present the issues raised in the appeal.

(g)(2) The appellee shall then file one brief, entitled Brief of Appellee and Cross-Appellant, which shall respond to the issues raised in the Brief of Appellant and present the issues raised in the cross-appeal.

(g)(3) The appellant shall then file one brief, entitled Reply Brief of Appellant and Brief of Cross-Appellee, which shall reply to the Brief of Appellee and respond to the Brief of Cross-Appellant.

(g)(4) The appellee may then file a Reply Brief of Cross-Appellant, which shall reply to the Brief of Cross-Appellee.

(h) *Permission for over length brief.* While such motions are disfavored, the court for good cause shown may upon motion permit a party to file a brief that exceeds the limitations of this rule. The motion shall state with specificity the issues to be briefed, the number of additional pages requested, and the good cause for granting the motion. A motion filed at least seven days before the date the brief is due or seeking five or fewer additional pages need not be accompanied by a copy of the brief. A motion filed less than seven days before the date the brief is due and seeking more than 5 additional pages shall be accompanied by a copy of the draft brief for in camera inspection. If the motion is granted, any responding party is entitled to an equal number of additional pages without further order of the court. Whether the motion is granted or denied, the draft brief will be destroyed by the court.

(i) *Briefs in cases involving multiple appellants or appellees.* In cases involving more than one appellant or appellee, including cases consolidated for purposes of the appeal, any number of either may join in a single brief, and any appellant or appellee may adopt by reference any part of the brief of another. Parties may similarly join in reply briefs.

(j) *Citation of supplemental authorities.* When pertinent and significant authorities come to the attention of a party after that party's brief has been filed, or after oral argument but before decision, a party may promptly advise the clerk of the appellate court, by letter setting forth the citations. An original letter and nine copies shall be filed in the Supreme Court. An original letter and seven copies shall be filed in the Court of Appeals. There shall be a reference either to the page of the brief or to a point argued orally to which the citations pertain, but the letter shall without argument state the reasons for the supplemental citations. Any response shall be made within 7 days of filing and shall be similarly limited.

(k) *Requirements and sanctions.* All briefs under this rule must be concise, presented with accuracy, logically arranged with proper headings and free from burdensome, irrelevant, immaterial or scandalous matters. Briefs which are not in compliance may be disregarded or stricken, on motion or sua sponte by the court, and the court may assess attorney fees against the offending lawyer.

(Amended effective October 1, 1992; July 1, 1994; April 1, 1995; April 1, 1998; November 1, 1999; April 1, 2003; November 1, 2004; April 1, 2006; November 1, 2006.)

Advisory Committee Note. — Rule 24 (a)(9) now reflects what Utah appellate courts have long held. *See In re Beesley*, 883 P.2d 1343, 1349 (Utah 1994); *Newmeyer v. Newmeyer*, 745 P.2d 1276, 1278 (Utah 1987). "To successfully appeal a trial court's findings of fact, appellate counsel must play the devil's advocate. '[Attorneys] must extricate [themselves] from the client's shoes and fully assume the adversary's position. In order to properly discharge the [marshalling] duty..., the challenger must present, in comprehensive and fastidious order, every scrap of competent evidence introduced at trial which *supports* the very findings the appellant resists.'" *ONEIDA/SLIC, v. ONEIDA Cold Storage and Warehouse, Inc.*, 872 P.2d 1051, 1052-53 (Utah App. 1994) (alteration in original) (quoting *West Valley City v. Majestic Inv. Co.*, 818 P.2d 1311, 1315 (Utah App. 1991)). See also *State ex rel. M.S. v. Salata*, 806 P.2d 1216, 1218 (Utah App. 1991); *Bell v. Elder*, 782 P.2d 545, 547 (Utah App. 1989); *State v. Moore*, 802 P.2d 732, 738-39 (Utah App. 1990).

The brief must contain for each issue raised on appeal, a statement of the applicable standard of review and citation of supporting authority.

Amendment Notes. — The 2003 amendment deleted Subdivision (k) pertaining to brief covers.

The 2004 amendment added the last sentence in Subdivision (a)(9).

The April 2006 amendment substituted "this paragraph" for "this rule" in the last sentence in Subdivision (g), deleted "and may be exceeded only by permission of the court. The court shall grant reasonable requests, for good cause shown" from the end of Subdivision (b), and added Subdivision (h), making related changes.

The 2006 amendment rewrote Subdivision (g).

NOTES TO DECISIONS

Constitutional arguments.

In order to make an argument for an innovative interpretation of a state constitutional provision textually similar to a federal provision, the following points should be developed and supported with authority and analysis. First, counsel should offer analysis of the unique context in which Utah's constitution developed with regard to the issue at hand. Second, counsel should demonstrate that state appellate courts regularly interpret even textually similar state constitutional provisions in a manner different from federal interpretations of the United States Constitution and that it is entirely proper to do so in our federal system. Third, citation should be made to authority from other states supporting the particular construction urged by counsel. State v. Bobo, 803 P.2d 1268 (Utah Ct. App. 1990).

Contents.

A brief must contain some support for each contention. State v. Wareham, 772 P.2d 960 (Utah 1989); State v. Reiners, 803 P.2d 1300 (Utah Ct. App. 1990).

Extensive quotations from numerous case authorities and treatises, while helpful, cannot substitute for the development of appellate arguments explicitly tied to the record. West Valley City v. Majestic Inv. Co., 818 P.2d 1311 (Utah Ct. App. 1991).

Appellant's brief was clearly deficient under the provisions of this rule because it failed to set forth a coherent statement of issues and the appropriate standard of review for each issue with supporting authority, the "issues" where listed did not correlate with the substance of the brief, the statement of the case not only omitted reference to the course of proceedings and disposition in the trial court, but failed to provide a statement of the relevant facts properly documented by citations to the record, and defendant's "argument" did not identify any error by the trial court, refer to the facts or the record, or cite applicable authority, much less provide any meaningful factual or legal analysis. State v. Price, 827 P.2d 247 (Utah Ct. App. 1992).

It is improper to use an addendum to incorporate argument by reference that should be included in the body of the brief. State v. Jiron, 866 P.2d 1249 (Utah Ct. App. 1993).

Appellate brief that set forth little legal analysis on issue presented, did not specifically discuss how trial court erred, did not attempt to marshal the evidence, and presented no citations to record failed to conform to requirements of this rule. Phillips v. Hatfield, 904 P.2d 1108 (Utah Ct. App. 1995).

Briefs must contain reasoned analysis based upon relevant legal authority. An issue is inadequately briefed when the overall analysis of the issue is so lacking as to shift the burden of research and argument to the reviewing court. State v. Sloan, 2003 UT App 170, 474 Utah Adv. Rep. 44, 72 P.3d 138.

—Argument.

Appellants' brief, containing less than a single page of assertions and no citations to the record, no legal authorities, and no analysis whatsoever, was not in compliance with this rule, which requires the brief of an appellant to contain an argument. Christensen v. Munns, 812 P.2d 69 (Utah Ct. App. 1991).

Court declined to consider argument that was not adequately briefed. See State ex rel C.Y. v. Yates, 834 P.2d 599 (Utah Ct. App. 1992).

Defendant's failure to brief the applicability of a common law construction (the good faith exception to the warrant requirement) under the Utah Constitution at the trial court level and his subsequent failure to develop any meaningful argument thereunder did not permit higher appellate review of these state constitutional claims, but left the analysis to proceed solely under federal constitutional law. State v. Horton, 848 P.2d 708 (Utah Ct. App.), cert. denied, 857 P.2d 948 (Utah 1993).

Because appellant failed to provide adequate legal analysis and legal authority in support of his claims, his assertions did not permit appellate review. Burns v. Summerhays, 927 P.2d 197 (Utah Ct. App. 1996); Snow Flower Homeowners Ass'n v. Snow Flower, Ltd., 2001 UT App 207, 31 P.3d 576.

Because the state failed to meet its briefing duty under Subdivision (a)(9) as to the search-incident-to-arrest argument regarding circumstances involving defendant convicted of unlawful possession of a controlled substance, the Court of Appeals declined to address the argument. State v. Montoya, 937 P.2d 145 (Utah Ct. App. 1997).

Implicitly, Subdivision (a)(9) requires not just bald citation to authority but development of that authority and reasoned analysis based on that authority. State v. Thomas, 961 P.2d 299 (Utah 1998).

While failure to cite to pertinent authority may not always render an issue inadequately briefed, it does so when the overall analysis of the issue is so lacking as to shift the burden of research and argument to the reviewing court. State v. Thomas, 961 P.2d 299 (Utah 1998).

Brief that purported to present three arguments, supported by five points, but that failed to cite legal authority and impermissibly shifted the burden of analysis to the reviewing court did not satify the requirements of this rule. Smith v. Smith, 1999 UT App 370, 995

P.2d 14, cert. denied, 4 P.3d 1289 (Utah 2000).

Summary judgment for defendants was appropriate where plaintiff failed to provide any reasons, as required by Subdivision (a)(9), to support the contention that disputes of material of fact existed. Brown v. Wanlass, 2001 UT App 30, 18 P.3d 1137.

This rule requires not just bald citation to authority but development of that authority and reasoned analysis based on that authority in order for an appellate issue to be adequately briefed. Spencer v. Pleasant View City, 2003 UT App 379, 486 Utah Adv. Rep. 30, 80 P.3d 546.

Because brief failed to articulate why a district court erred in dismissing a county from a lawsuit or any theory as to how the county was liable for a patient's suicide, there was no reason to address an appeal from the dismissal. Davis v. Cent. Utah Counseling Ctr., 2006 UT 52, 147 P.3d 390.

—Inadequate.

Brief listing a disjointed array of facts selected because they aided appellant's cause, containing legal analysis that was little more than a conclusory statement unsupported by analysis or authority, and that failed to cite properly to the record, a failing that required the court to research and review the voluminous record itself to uncover the factual underpinnings of defendant's assertions, was inadequate. State v. Green, 2005 UT 9, 518 Utah Adv. Rep. 30, 108 P.3d 710.

—Inappropriate language.

Derogatory references to others or inappropriate language of any kind has no place in an appellate brief and is of no assistance in attempting to resolve any legitimate issues presented on appeal. State v. Cook, 714 P.2d 296 (Utah 1986).

—Standard of review.

The standard of review requirement in Subdivision (a)(5) should not be ignored. The purpose of the requirement is to focus the briefs, thus promoting more accuracy and efficiency in the processing of appeals. Christensen v. Munns, 812 P.2d 69 (Utah Ct. App. 1991).

—Statement of facts with citation to record.

The Supreme Court need not, and will not, consider any facts not properly cited to, or supported by, the record. Uckerman v. Lincoln Nat'l Life Ins. Co., 588 P.2d 142 (Utah 1978).

The Supreme Court will assume the correctness of the judgment in a criminal trial if counsel on appeal does not comply with the requirements as to making a concise statement of facts and citation of the pages in the record where they are supported. State v. Tucker, 657 P.2d 755 (Utah 1982).

If a party fails to make a concise statement of the facts and citation of the pages in the record where those facts are supported, the court will assume the correctness of the judgment below. Koulis v. Standard Oil Co., 746 P.2d 1182 (Utah Ct. App. 1987); Steele v. Board of Review of Indus. Comm'n, 845 P.2d 960 (Utah Ct. App. 1993).

Where the plaintiff appealed the issue of the trial court's allowing lay opinion regarding the supposed reasonableness of a defendant's driving conduct, but the defendant failed to specifically cite any such testimony in the record, the Supreme Court refused to address the issue under this rule. Child v. Gonda, 972 P.2d 425 (Utah 1998).

Where defendant argued that he was not advised, at the time of his prior convictions for driving under the influence of alcohol (DUI), of the possibility of enhancement if defendant was again convicted in the future, and argued that the state had not provided written evidence to prove that defendant was so advised, it was defendant's burden, not the state's, to provide citations to the record to support his arguments that he was not so advised. State v. Marshall, 2003 UT App 381, 486 Utah Adv. Rep. 55, 81 P.3d 775, cert. denied, 87 P.3d 1163 (Utah 2004), cert. denied, 90 P.3d 1041 (Utah 2004).

Failure to file.

—Defective appeal.

Where defendant was convicted of operating a motor vehicle without insurance, and attempted to file his appeal pro se, but failed to file a brief or submit a transcript of the record, there was no reversible error presented which would permit the appellate court to reverse the judgment. State v. Hansen, 540 P.2d 935 (Utah 1975).

Issues not raised at trial.

An appellate court may address an issue raised for the first time on appeal if appellant establishes that the trial court committed plain error, if there are exceptional circumstances, or, in some situations, if a claim of ineffective assistance of counsel is raised on appeal. State v. Irwin, 924 P.2d 5 (Utah Ct. App. 1996), cert. denied, 931 P.2d 146 (Utah 1997).

The exceptional circumstances concept serves to assure that manifest injustice does not result from the failure to consider an issue on appeal. State v. Irwin, 924 P.2d 5 (Utah Ct. App. 1996), cert. denied, 931 P.2d 146 (Utah 1997).

The fact that liberty is at stake is not sufficient basis for deviating from the general rule requiring the appellant to raise the issue at trial, in order to argue it on appeal. State v. Irwin, 924 P.2d 5 (Utah Ct. App. 1996), cert. denied, 931 P.2d 146 (Utah 1997).

The trial counsel's failure to object to the prosecution's apparently improper remarks at sentencing, even in conjunction with the expiration of the time within which to make a timely motion to withdraw the plea, is not a substantial enough procedural anomaly to invoke the exceptional circumstances concept which would allow appellant to raise an issue on appeal for the first time. State v. Irwin, 924 P.2d 5 (Utah Ct. App. 1996), cert. denied, 931 P.2d 146 (Utah 1997).

Because plaintiff had not properly raised three issues in the trial court that he raised on appeal, and because he argued plain error or manifest injustice for the first time in his reply brief, the court refused to review the three issues. Coleman v. Stevens, 2000 UT 98, 17 P.3d 1122.

Because plaintiff raised issues for the first time on appeal concerning breach of contract and battery claims, and did not argue plain error or exceptional circumstances in the dismissal of those claims, the court declined to address the issues and affirmed the grant of summary judgment thereon. Walter v. Stewart, 2003 UT App 86, 67 P.3d 1042, cert. denied, 73 P.3d 946 (2003).

Noncompliance with rule.

The Supreme Court declined to address any of the arguments raised in a brief that failed to meet almost every requirement of this rule. MacKay v. Hardy, 973 P.2d 941 (Utah 1998).

The court declined to consider the merits of the issues briefed where defendant's brief failed to cite relevant legal authority or provide any meaningful analysis. State v. Shepherd, 1999 UT App 305, 989 P.2d 503.

Defendant's brief did not adequately set forth an argument as required by Subdivision (a)(9) of this rule. However, because the court was not obligated to strike or disregard a marginal or inadequate brief, in the interests of justice, the court chose chose to address defendant's arguments. State v. Gamblin, 2000 UT 44, 1 P.3d 1108.

In defendant's appeal of convictions for terroristic threat and threatening an elected official, his failure to provide adequate legal analysis or authority to support his contentions on appeal did not permit any meaningful review by the appellate court; his brief failed to comply with the requirements or purpose of this rule and his convictions were accordingly affirmed. State v. Lucero, 2002 UT App 135, 47 P.3d 107.

Appellate court temporarily remanded an appeal to the trial court for appointment of new counsel for defendant because the brief filed by defendant's appellate counsel was wholly inadequate for its failure to contain a statement of grounds for seeking review of an issue not preserved in the trial court and defendant raised Fourth Amendment claims that were not preserved for appeal. Ogden City v. Stites, 2002 UT App 357, 58 P.3d 865.

Where a party failed to marshal the evidence and properly brief the issues that it raised on appeal and instead indicated that it could not marshal the evidence because the court had imposed a 100-page limit which forced it to rely on its addenda to satisfy its marshaling burden, and additionally, where it failed to attempt to meet its burden of demonstrating that the trial court's findings of fact were clearly erroneous, which was the issue raised, the appellate court declined to review the issue. Aspenwood, L.L.C. v. C.A.T., L.L.C., 2003 UT App 28, 466 Utah Adv. Rep. 7, 73 P.3d 947, cert. denied, 72 P.3d 685 (2003).

In action by investors relating to their losses in a failed investment venture, because the investors failed to brief the dismissal of five of their causes of action, they waived the opportunity to appeal the dismissal. Coroles v. Sabey, 2003 UT App 339, 485 Utah Adv. Rep. 3, 79 P.3d 974.

Defendant, convicted of rape and aggravated sexual abuse of a child, did not specifically set forth hearsay statements he challenged on review nor did he provide any relevant facts for review. Accordingly, the court could not consider the argument as it failed to comply with this rule. (Unpublished decision.) State v. Timsanico, 2005 UT App 158.

In a partition action, because tenant in common failed to marshal the evidence to support its argument that a mine company, the other tenant in common, had waived its right to partition, the appellate court assumed that the trial court's findings were supported by the evidence. United Park City Mines Co. v. Stichting Mayflower Mt. Fonds, 2006 UT 35, 140 P.3d 1200.

Preservation of issues.

Plaintiff's First Amendment argument was not properly preserved for appeal because it failed to meet the requirements of specificity and citation to authority. In his motion for summary judgment and his motion in limine, plaintiff made a generalized argument that his conduct towards defendant was protected by his First Amendment right to petition the government; however, in neither motion did plaintiff cite any relevant authority that supported that proposition, and he did not argue that defendant was required to prove that plaintiff's statements were made with "actual malice." Hatch v. Davis, 2004 UT App 378, 511 Utah Adv. Rep. 16, 102 P.3d 774.

Properly documented argument.

Brief that was filled with burdensome, emotional, immaterial and inaccurate arguments did not set forth a properly documented argument as required by this rule; therefore the court disregarded it. Koulis v. Standard Oil Co., 746 P.2d 1182 (Utah Ct. App. 1987).

Where a city failed to demonstrate by way of statute, ordinance, case law, or other authority how failure to file a site plan could defeat or invalidate an otherwise legal nonconforming use, the court rejected the city's contention regarding the nonconforming use. Hugoe v. Woods Cross City, 1999 UT App 281, 988 P.2d 456.

The plaintiff's general statement that the trial court's finding that a lessee placed a sign for the purpose of "forestalling competitive activity" supported a violation of the antitrust statute was insufficient to persuade the appellate court that a violation occurred. U.P.C., Inc. v. R.O.A. General, Inc., 1999 UT App 303, 990 P.2d 945.

Reply brief.

As a general rule, an issue raised initially in a reply brief will not be considered on appeal, although the court, in its discretion, may decided a case upon any points that its proper disposition may require, even if first raised in a reply brief. Romrell v. Zions First Nat'l Bank, 611 P.2d 392 (Utah 1980).

Observation by the state in a footnote that defendant had not raised a particular issue in the trial court or in his opening brief on appeal did not constitute a "new matter" entitling defendant to brief the issue in his reply brief. State v. Kruger, 2000 UT 60, 6 P.3d 1116.

Sanctions.

Trial court properly awarded attorney's fees

to defendant as a sanction against plaintiff whose brief was extraordinarily deficient. The brief was bereft of any organizational coherency or structure and the arguments were for the most part unsupported by any specific legal citation or analysis. Nipper v. Douglas, 2004 UT App 118, 497 Utah Adv. Rep. 11, 90 P.3d 649, cert. denied, 94 P.3d 929 (Utah 2004).

Cited in Weber v. Snyderville West, 800 P.2d 316 (Utah Ct. App. 1990); State v. Hoyt, 806 P.2d 204 (Utah Ct. App. 1991); State ex rel. M.S. v. Salata, 806 P.2d 1216 (Utah Ct. App. 1991); State v. Cayer, 814 P.2d 604 (Utah Ct. App. 1991); English v. Standard Optical Co., 814 P.2d 613 (Utah Ct. App. 1991); Hinckley v. Hinckley, 815 P.2d 1352 (Utah Ct. App. 1991); Larson v. Overland Thrift & Loan, 818 P.2d 1316 (Utah Ct. App. 1991); State v. Davis, 821 P.2d 9 (Utah Ct. App. 1991); State v. Garza, 820 P.2d 937 (Utah Ct. App. 1991); Johnson-Bowles Co. v. Department of Commerce, 829 P.2d 101 (Utah Ct. App. 1991); Middlestadt v. Indus. Comm'n, 852 P.2d 1012 (Utah Ct. App. 1993); Baker v. Baker, 866 P.2d 540 (Utah Ct. App. 1993); Barney v. Utah Dep't of Commerce, 885 P.2d 809 (Utah Ct. App. 1994); Reeves v. Steinfeldt, 915 P.2d 1073 (Utah Ct. App. 1996); State v. Bryant, 965 P.2d 539 (Utah Ct. App. 1998); State v. Fisher, 972 P.2d 90 (Utah Ct. App. 1998); State v. Tarnawiecki, 2000 UT App 186, 5 P.3d 1222; Holmstrom v. C.R. England, Inc., 2000 UT App 239, 8 P.3d 281; State v. Helmick, 2000 UT 70, 9 P.3d 164; Gorostieta v. Parkinson, 2000 UT 99, 17 P.3d 1110; Ellis v. Swensen, 2000 UT 101, 16 P.3d 1233; Rackley v. Fairview Care Ctrs., Inc., 2001 UT 32, 23 P.3d 1022; F.R. v. State, 2001 UT App 66, 21 P.3d 680; Associated Gen. Contractors v. Board of Oil, Gas & Mining, 2001 UT 112, 38 P.3d 291; State v. Honie, 2002 UT 4, 57 P.3d 977, cert. denied, 537 U.S. 863, 123 S. Ct. 257, 154 L. Ed. 2d 105 (2002); Weber County v. Chambers, 2001 UT 53, 28 P.3d 694; State v. Waldron, 2002 UT App 175, 51 P.3d 21; State v. Werner, 2003 UT App 268, 478 Utah Adv. Rep. 37, 76 P.3d 204; Davis v. Davis, 2003 UT App 282, 479 Utah Adv. Rep. 6, 76 P.3d 716; Save Our Schools v. Board of Educ., 2005 UT 55, 122 P.3d 611; Chang v. Soldier Summit Dev., 2003 UT App 415, 488 Utah Adv. Rep. 8, 82 P.3d 203.

COLLATERAL REFERENCES

Am. Jur. 2d. — 5 Am. Jur. 2d Appellate Review § 540 et seq.

C.J.S. — 4 C.J.S. Appeal and Error § 605 et seq.

Rule 25. Brief of an amicus curiae or guardian ad litem.

A brief of an amicus curiae or of a guardian ad litem representing a minor who is not a party to the appeal may be filed only by leave of court granted on motion or at the request of the court. Parties to the case may indicate their support for, or opposition to, the motion. A motion for leave shall identify the interest of the applicant and shall state the reasons why a brief of an amicus curiae or the guardian ad litem is desirable. Except as all parties otherwise consent, an amicus curiae or guardian ad litem shall file its brief within the time allowed the party whose position as to affirmance or reversal the amicus curiae or guardian ad litem will support, unless the court for cause shown otherwise orders. A motion of an amicus curiae or guardian ad litem to participate in the oral argument will be granted when circumstances warrant in the court's discretion.
(Amended effective April 1, 2004.)

Amendment Notes. — The 2004 amendment deleted "if accompanied by written consent of all parties, or" after "may be filed only" in the first sentence and added the second sentence.

COLLATERAL REFERENCES

Am. Jur. 2d. — 5 Am. Jur. 2d Appellate Review § 540.

Rule 26. Filing and service of briefs.

(a) *Time for service and filing briefs.* Briefs shall be deemed filed on the date of the postmark if first-class mail is utilized. The appellant shall serve and file a brief within 40 days after date of notice from the clerk of the appellate court pursuant to Rule 13. If a motion for summary disposition of the appeal or a motion to remand for determination of ineffective assistance of counsel is filed

Tab C

ADDENDUM C

Trial Court's Findings of Fact and Conclusions of Law

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IN THE THIRD JUDICIAL DISTRICT COURT FOR SALT LAKE COUNTY

STATE OF UTAH

ANDREW GALLEGOS and JOAN GALLEGOS, Plaintiffs, v. JAMES LLOYD; JULIE LLOYD; MOUNTAIN AMERICA FEDERAL CREDIT UNION, a Utah non-profit corporation; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., a Delaware corporation, as nominee for COUNTRYWIDE HOME LOANS, INC., a New York corporation, dba AMERICA'S WHOLESALE LENDER; J. SCOTT LUNDBERG, trustee; and CAREY JOHANSEN dba LAND DESIGN, Defendants.	FINDINGS OF FACT AND CONCLUSIONS OF LAW Case No. 040916534 Judge John Paul Kennedy

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This matter came on regularly for trial before the above-entitled Court on June 27th and 28th, 2006, with the Honorable John Paul Kennedy, District Judge, presiding without a jury. Plaintiffs were present and represented by their counsel, George A. Hunt and

Stephen T. Hester of Williams & Hunt. Defendants James and Julie Lloyd were present and represented by their counsel, T. Richard Davis of Callister, Nebeker & McCullough. Defendant Mountain America Federal Credit Union was present and represented by its counsel William G. Wilson of Scalley & Reading, and Defendant Countrywide Home Loans, Inc. was present and represented by its counsel, Darren K. Nelson of Parr, Waddoups, Brown & Gee. Witnesses were sworn and counsel elicited testimony from the witnesses, presented documentary exhibits and argued their respective positions to the Court. The parties then submitted the case for decision and the Court issued a ruling from the bench at the close of trial. Consistent with that ruling and in support thereof, the Court now enters the following

FINDINGS OF FACT

1. The Plaintiffs, Andrew and Joan Gallegos (the "Gallegos"") are record owners of real property located in Salt Lake County, State of Utah, more specifically described as Lot 102 Emigration Oaks Subdivision, Phase III, Salt Lake City, Utah, 84108 ("Lot 102").

2. Defendants James and Julie Lloyd (the "Lloyds") are the record owners and residents of real property located in Salt Lake County, State of Utah, more specifically described as Lot 106 Emigration Oaks Subdivision, Phase V, commonly known as 5982 Pioneer Fork Road, Salt Lake City, Utah, 84108 ("Lot 106").

3. Defendant Mountain American Federal Credit Union ("Mountain America") is a Utah non-profit corporation and a federally chartered credit union with its principal place of business in West Jordan, Salt Lake County, Utah.

4. Defendant Mortgage Electronic Registration System, Inc. ("MERS") is a Delaware corporation licensed to do business in Salt Lake County, Utah and is acting as nominee for Countrywide Home Loans, Inc., a New York corporation, dba America's Wholesale Lender ("Countrywide").

5. Lots 102 and 106 share a common property line. The common property line is situated on top of a ridge.

6. In 1993, the Gallegos purchased Lot 102 of the Emigration Oaks Subdivision, Phase III, in order to build their dream home sometime in the future.

7. In June of 1996, Defendants James and Julie Lloyd purchased Lot 106 of the Emigration Oaks Subdivision, Phase V. The topography of Lot 106 was a slope elevating from the east property line up to the west property line shared with Lot 102.

8. In an effort to improve Lot 106, the Lloyds engaged the services of Mr. James Carroll to provide architectural drawings of a home to be built on Lot 106.

9. Mr. Carroll provided detailed drawings of the Lloyds future home, including a site plan, to the Lloyds and submitted the drawings and site plan to Salt Lake County to gain approval to begin construction on Lot 106 (the "Lot 106 Site Plan"). Mr. Carroll

denies inspecting the construction of the Lloyd Home to ensure compliance with the requirements of the Lot 106 Site Plan, although he visited the property five or six times during construction.

10. No evidence was presented regarding whether Defendants Mountain America and Countrywide (who hold deeds of trust against Lot 106) inspected the construction of the Lloyd home to ensure compliance with the Lot 106 Site Plan, nor was any argument made that they had a duty to do so.

11. Salt Lake County approved the Lot 106 Site Plan in or about August 1996 and the Lloyds began construction of their home (the "Lloyd Home") immediately thereafter.

12. Mr. Lloyd acted as the general contractor overseeing the construction of the Lloyd Home. Mrs. Lloyd assisted Mr. Lloyd in his duties as general contractor by reviewing and paying invoices of subcontractors.

13. The Lloyd Home was neither staked nor constructed according to the requirements of the Lot 106 Site Plan. The Lloyd Home was staked on Lot 106 in such a way that a portion of the home was built upon, and in fact encroached upon, Lot 102.

14. The Lloyd's assertion that they were unaware of the fact that the construction of their home was not proceeding according to the Lot 106 Site Plan and, hence, that they were not aware of any potential encroachment onto Lot 102, is not credible. Likewise, the

Lloyd's assertion that they relied upon other professionals to properly stake theire home or notify them that their home was not located according to the Lot 106 Site Plan, is not credible.

15. There were several physical markers required by the Lot 106 Site Plan which never materialized during the construction of the Lloyd's home. These markers included: 1) the presence of a 12 to 14 foot high embankment on the west side of the Lloyd Home; 2) the presence of two large retaining walls on both the west and east side of the driveway; and 3) an average grade on the driveway of 8.5% with a maximum grade of 10%. The absence of these markers provided unmistakable notice to the Lloyd's that their home was being constructed in the wrong location.

16. The Lloyds were negligent in going forward with the construction of their home as staked because the Lloyds knew, or should have known, that the staking and subsequent construction of their home violated the requirements of the Lot 106 Site Plan.

17. The Lloyds disregarded the requirements of the Lot 106 Site Plan to their considerable advantage.

18. Motive existed for the Lloyds to ignore the requirements of the Lot 106 Site Plan. This motive included: 1) avoiding increased excavation costs associated with the excavation required by the Lot 106 Site Plan; 2) an improved view with southern exposure;

and 3) constructing a relatively flat driveway rather than the average 8.5% slope contemplated by the Lot 106 Site Plan.

19. In July 1997, the Lloyds finished construction of their home on Lot 106. As a result of the Lloyd's actions and/or omissions, the home encroached upon Lot 102, well beyond the minimal set back and side yard requirements required by the Lot 106 Site Plan.

20. In disregarding the requirements of the Lot 106 Site Plan, the Lloyds intended to build their home in such a way that resulted in the unlawful invasion of the Gallegos' property.

21. As a result of the Lloyds' disregard for the requirements of the Lot 106 Site Plan, the Lloyd Home is fifteen feet higher in elevation than contemplated by the Lot 106 Site Plan and sits laterally over forty feet west of its designated location.

22. The ultimate siting of the Lloyd Home interfered with the Gallegos' view from Lot 102.

23. As a result of the Lloyds' encroachment on to Lot 102, the Gallegos were unable to build a home on Lot 102 pursuant to architectural designs they had previously developed and purchased.

24. As a further result of the Lloyds' encroachment on to Lot 102, the Gallegos were unable to determine when they would be able to obtain a building permit for Lot 102 and commence construction. Due to the indeterminable delay in commencing construction

on Lot 102, the Gallegos purchased Lot 14 in Phase I of the Emigration Oaks Subdivision and proceeded with a new home design.

25. As a direct consequence of Mr. Lloyd's actions and/or omissions, the Gallegos incurred architectural and storage fees that they would not have otherwise incurred, and paid taxes on property being occupied and utilized by the Lloyds.

26. The amount of the damages suffered by the Gallegos as a direct consequence of the trespass of the Lloyds, are as follows:

Architectural Fees	$39,500.00
Taxes	2,753.31
Storage Fees	2,300.00
Lost Property Value	27,500.00
TOTAL	$72,053.31

27. The encroachment and damages for taxes will continue until the boundary can be adjusted and approved by the Emigration Oaks Homeowners Association and any and all local authorities having jurisdiction over such matters. The correct approach to adjustment is the approach suggested by the Gallegos' expert witness, Mr. Jerry Webber, viz., transfer a 38 foot wide strip along Lot 102's eastern boundary to the Lloyds in consideration of the $27,500 in damages noted in ¶ 25, above. Such adjustment will require the services of a licensed surveyor and the Lloyds should pay all such costs, together with any and all fees and other costs associated with adjusting the respective property

boundaries and obtaining approval from the Emigration Oaks Homeowners Association and any and all local authorities having jurisdiction over such matters.

28. Moving or demolishing the Lloyd home would involve economic waste and therefore the boundary adjustment mechanism described above is the most equitable method of resolving the encroachment.

29. As a direct consequence of the actions and/or omissions of the Lloyds, the Gallegos were required to obtain counsel and pursue this action in order to resolve the boundary encroachment, adjust the lot boundaries, and render Lot 102 usable and marketable. The Lloyds initiated no action to address or resolve their trespass. In addition, the Lloyds failed to act in good faith in their defense of this action. In particular, the Lloyds lacked an honest belief in the propriety of their actions and, ultimately, took advantage of Plaintiffs' property rights of which they knew or should have known. Their defense to the Gallegos' claims was without merit. The amount of Plaintiffs' attorneys' fees incurred should be established by motion pursuant to Rule 73, Utah Rules of Civil Procedure.

30. The Court did not find by clear and convincing evidence that the actions and/or omissions of the Lloyds were the result of willful and malicious or intentionally fraudulent conduct, or conduct that manifests a knowing and reckless indifference toward the rights of the Gallegos.

FROM THE foregoing Findings of Fact, the Court draws the following

CONCLUSIONS OF LAW

1. This Court has personal jurisdiction over the parties and subject matter jurisdiction over this action.

2. Venue is properly laid in this District.

3. The Gallegos were, at all relevant times, in actual possession of Lot 102.

4. The Lloyds trespassed on to Lot 102 by causing their home to be built in such a fashion and location that it encroaches on Lot 102.

5. Acting as the general contractor in building his own home, Mr. Lloyd owed the Gallegos a duty to situate the location of his home with reasonable care and to ensure that his home was constructed according to the Lot 106 Site Plan.

6. Mr. Lloyd breached that duty by staking the Lloyd Home in such a way as to cause the home to be situated and constructed so that it encroached upon Lot 102.

7. The Lloyd's knew or should have known that their home was not staked or constructed according to the requirements of the Lot 106 Site Plan but proceeded with construction anyway.

8. It was foreseeable that, as a result of Mr. Lloyd's breach of his duty to properly stake his home and ensure that it was constructed according to the requirements of the Lot 106 Site Plan, the Gallegos would suffer damages.

9. The Lloyd's actions and/or omissions caused the Gallegos to be damaged.

10. Mr. Lloyd acted unreasonably in proceeding with construction of the Lloyd Home in violation of the Lot 106 Site Plan.

11. It was reasonable for the Gallegos to pursue the design and construction of a new home on Lot 14 in the Emigration Oaks Subdivision as a result of the Lloyds' encroachment on Lot 102.

12. As a result of the Lloyds' encroachment upon Lot 102, the Gallegos should recover damages consisting of: 1) architectural fees in the amount of $39,500.00; 2) taxes paid on Lot 102 in the amount of $2,753.31 and continuing until property boundary is re-drawn; 3) storage fees of $2,300.00; and 4) diminution in value of Lot 102 in the amount of $27,500.00.

13. As a further result of the Lloyds' encroachment upon Lot 102, the Gallegos suffered consequential damages in the form of attorney's fees which should be recovered. In addition, based on the documentary evidence and witness testimony presented at trial, the Lloyds' defense of this action was without merit and not asserted in good faith. Accordingly, attorney's fees should be awarded to Plaintiffs under Utah Code Ann. § 78-27-56, the amount to be established by motion under Rules 54 and 73 of the Utah Rules of Civil Procedure.

14. As a further result of the Lloyds' encroachment on to Lot 102, the property boundary between Lot 102 and Lot 106 must be re-drawn in accordance with the expert report of Mr. Jerry Webber. The new property boundary should run parallel with the existing property boundary and should include approximately 7,800 square feet of Lot 102. In the event that the property added by the boundary adjustment contains any scrub oak, the conveyance should provide a perpetual easement encompassing that scrub oak thereby preventing its destruction and/or removal.

15. The fees and costs associated with preparing the new property boundary and obtaining approval of the new property boundary from the Emigration Oaks Homeowners Association and any and all local authorities having jurisdiction over such matters, should be paid by the Lloyds.

16. No award of punitive damages should be made in this matter.

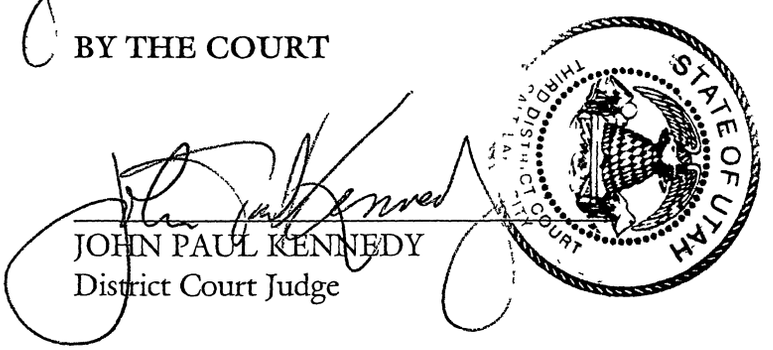
17. Defendants Mountain America and Countrywide are not culpable in this matter and are not responsible for any of the damages suffered by Plaintiffs. Accordingly, they should be dismissed from this action.

18. The Court should retain jurisdiction over this matter until the property boundary adjustment is completed and all costs and fees associated therewith have been paid in full.

19. The Court should enter a Judgment and Decree consistent herewith.

DATED this 19 day of July, 2006.

BY THE COURT



JOHN PAUL KENNEDY
District Court Judge

APPROVED AS TO FORM:

T. RICHARD DAVIS

WILLIAM G. WILSON

DARREN K. NELSON

129443 1

Tab D

ADDENDUM D

Transcript of Ruling Only on 6/28/06 and Motion on Attorney's Fees on 11/2/06

IN THE THIRD JUDICIAL DISTRICT COURT, SALT LAKE CITY

SALT LAKE COUNTY, STATE OF UTAH

ANDREW GALLEGOS, et al.,	: Case No. 040916534 PR
Plaintiffs,	:
vs.	: Appellate Case 20061135-SC
JAMES LLOYD, et al.,	:
Defendants.	: With Keyword Index

June 28, 2006 RULING ONLY Page 1
November 2, 2006 MOTION ON ATTORNEY'S FEES 9

BEFORE

THE HONORABLE JOHN PAUL KENNEDY

CAROLYN ERICKSON, CSR
CERTIFIED COURT TRANSCRIBER
1775 East Ellen Way
Sandy, Utah 84092
801-523-1186

SALT LAKE CITY, UTAH - JUNE 28, 2006

JUDGE JOHN PAUL KENNEDY PRESIDING

(Transcriber's note: Speaker identification may not be accurate with audio recordings)

PARTIAL TRANSCRIPT - RULING ONLY

P R O C E E D I N G S

THE COURT: Well, I think as our discussion focused here, the problem appears to be that no one seems to be able to say how long the process of being able to get a building permit would have taken. The testimony was that Gallegoses were under some sort of unique family pressures that prompted them to need to act. I find that their decision to buy a new lot and proceed with the house on that location, on Location 14, was a reasonable decision given the facts.

I find also that Mr. Lloyd was certainly negligent in going forward with the construction on his home in the location in which it was ultimately situated which I find in violation of the approved site plan.

I find that if the lot were, in fact, staked as it was built, it was not reasonable for him to rely on that staking. There were too many other indications to indicate that it was correct. I would find that he either knew or should have known that the house was in the wrong place but he proceeded anyway.

I find that he - that motivations existed to build

where he did and that those included saving money and excavation costs, improving the view, and access and general layout of the lot.

I find that the house, as built, is about 15 feet higher than it should have been if it had been built according to the approved site plan. And I find that that ultimate citing of the house, of the Lloyds, in fact, interfered with their view, particularly with respect to the upper floors of the house. And I think if you look at the drawings you'll see that the upper floors went up as high as 20 some feet and I don't think a photo from a 12-foot level covers that. In addition, I don't think, especially in the winter time, I don't think that any of the trees would cover the Lloyd's home even from the lower floors.

So, I find that defendant's actions have caused plaintiffs damages in a number of areas. I think with respect to the architect's billings, I find that they appear to be reasonable and necessary in all respects except I don't believe that the conversion drawings were justified. I think there could have been a decision made to just go ahead and junk the original drawings and go forward with new ones and I think they would have saved, as I recall, approximately $11,000, $12,000.

In addition, I saw some other costs relating to the boundary issues which didn't appear to me to be legitimate in

terms of timing, and also, there was some legal costs tacked on. I wasn't quite sure why those would be justified, so I did not allow that. But I felt that $39,500 worth of architect's costs and fees were justified. I felt that the taxes of $2,753.31 through the date calculated were justified and would continue until the trespass is abated in some fashion. We'll talk about that in a minute.

With respect to storage, I also agreed with the defense counsel on that one. It was hard for me to see all of that storage as being legitimate and my feeling was that it would be reasonable to incur some of that expense, but not all of it, and so I've - and plus I think some of it was shown to not be appropriate in the testimony. So, on storage, I order $2,300.

With respect to the diminution of value, we had a range, as I recall it went from a number in Exhibit 15, as I recall was 35 8, and I think Mr. Cook's number was significantly lower than that. I tried to do some rough calculated on a basis of a square-footage number and I came up with something like $19,800. I felt that Mr. Cook's estimates and rationale were not as persuasive or as credible as Mr. Webber's, but, nonetheless, I thought some of Mr. Webber's were a little overstated. So, my feeling is with respect to the diminution in value - and this is based on an assumption that we would have a slice taken out of the

Gallegos' property equivalent to 7,800 feet. The diminution in value would be $27,500.

Now, I found that the lenders are not culpable in this matter. Maybe if they had somebody who was looking over the documents and actually going out and checking the property, some of these problems could have been avoided, but I don't think there's any evidence to show that that's the practice and, for what it's worth, my personal experience is that they don't usually do that anyway. So, I'm not going to find them liable or responsible for any of these damages, that the damages that I found are going to be the responsibility of the Lloyds.

The thing that I struggle with the most is how anyone can say, given these facts and my findings, that what the Lloyds did wasn't either reckless disregard of the rights of the plaintiffs, gross negligence or willful, a willful act and I think to make such a finding, I need clear and convincing evidence. I'm not going to make such a finding, but I can tell you that it's by the slimmest of margin that I'm not making such a finding.

I do feel that the actions of the Lloyds have resulted in consequential damages to the Gallegoses, and in this case, I think those consequential damages include attorney's fees. I wouldn't find that in every case, but in this case I think it's clear that they should have known that

their disregard of all of these indicators, could have and probably would have resulted in serious problems which would have in turn resolved in, in all likelihood, in extensive litigation costs. So, as a result, I'm finding as consequential damages the attorney's fees incurred by the plaintiffs in this case.

And I'm not going to award punitive damages.

Now, with respect to the property boundary, it would seem to me that we need to redraw the boundary for this property. As I've indicated, I think 7,800 square feet, and I would accept the opinion of Mr. Webber that to make that line either irregular or at an angle would end up as a disservice to this particular piece of property and would negatively impact its value. So, I would require that line to run parallel to the existing property line and as number feet over that it would need to be to equal that 7,800 square feet. I don't know what the exact number of feet is, I think it was on the order of 38 feet or thereabouts.

The costs for preparing the new boundary and getting it approved through the homeowners' association, as well as through many local authorities, like the county, are to be borne by Lloyds. In the event that that property line, the new property line, goes through any existing scrub oak I would place a perpetual easement protecting that scrub oak as well, so that if some of that scrub oak ends up on his part

of the line, he will not be able to go cut it down.

I'm going to leave the issues with respect to the septic tank to further resolution in the normal course through the homeowners' association and if the parties, if whoever ends up owning that lot wants to work something out, fine, but otherwise, I'm not going to require anything specific on that.

I'm going to ask you, Mr. - well, I think it's probably better for the plaintiff, for you, Mr. Hunt, to prepare the order in this matter but I want you to do it in close cooperation with Mr. Davis-

MR. HUNT: Sure.

THE COURT: - so that you get his input. I think both of you are extremely capable, competent, reasonable attorneys. And I think - I want to complement you both on the job that you've done here in this trial over the last two days. I think you both have done an excellent job.

And I don't know how much in terms of punitive damages you've saved your client, Mr. Davis, but conceivably a lot by your arguments today. I think they've been good arguments and they've been persuasive on that issue as well as the other issues and I would complement each of you on what you presented. So, I would ask you both to work together and try to work out something that would make sense.

Anything further from either side?

MR. HUNT: Got a question, Your Honor. The award of attorney's fees and you're calling that consequential damages, not either allowed by statute or by contract, but just as consequential damages; is that what I understand?

THE COURT: Well, I guess I have two choices. I guess I could find punitive, a need for punitive damages here and award them in that context, or I could put them in as consequential damages on the other hand and it would seem to me to be, it would save further hearing on a punitive damage award. As I say, by the slimmest of margin, I have not awarded punitive damages here, but I think consequential damages are appropriate.

MR. HUNT: Your Honor, if I may speak to that. I think also the Court has the latitude to find that the position advanced by the Lloyds in defense of the client is not credible and that gives the Court latitude under 78-27-56.

THE COURT: Well, and I would - I would so find that. I think that that's - warrant that.

MR. HUNT: We can submit that by motion and affidavit in dealing with the amount or-

THE COURT: Again, have Mr. Davis look that over carefully.

MR. HUNT: Sure.

THE COURT: Anything further?

MR. HUNT: No, thank you, Your Honor.

MR. DAVIS: No, Your Honor.

THE COURT: Okay. Then we will be in recess.

(Whereupon the hearing was concluded)

-C-

SALT LAKE CITY, UTAH - NOVEMBER 2, 2006

JUDGE JOHN PAUL KENNEDY PRESIDING

(Transcriber's note: Speaker identification may not be accurate with audio recordings)

For the Plaintiffs: GEORGE A. HUNT

For the Defendants: T. RICHARD DAVIS

P R O C E E D I N G S

THE COURT: We're here on the Gallegos versus Lloyd matter. Do you want to state your appearances?

MR. HUNT: George Hunt for the plaintiffs, Andy and Joan Gallegos.

MR. DAVIS: Richard Davis on behalf of Defendants Lloyd.

THE COURT: Okay. We are convened today to discuss the plaintiffs' motion for attorney's fees which has been objected to by Mr. Davis on behalf of his clients, the Lloyds. So, Mr. Davis, why don't you tell me why you think that the petition should be denied?

MR. DAVIS: Thank you, Your Honor. Would you like me to stand?

There are actually three issues here and I think we began to discuss these at the very end of the trial after the Court delivered its findings from the bench, and we discussed the issue of how the attorney's fees can be awarded, whether they be consequential damages or what and the questions were

made and the Court was fairly direct in saying, "I would like these to be consequential damages," notwithstanding the issues that were raised. Mr. Hunt raised the issue of, that he could substantiate them under the bad faith statute.

Since that time and pursuant to the rule, once the attorney's fee issue then is brought to the court to be approved, as far as numbers, then it is our responsibility to object to the same. The objections are very similar to the ones that we've had before, and are more specifically set out in our memorandum.

The first issue is that under a bad faith defense, under the - well, even before that, under the American Rule, the general American Rule, attorneys' fees are awarded when they're authorized by either statute or by contract in the parties. We don't have a contract between the parties. The statute here is, that is being identified by the plaintiffs is the Bad Faith Statute which says that "if a claim or a defense is asserted without merit and in bad faith then reasonable attorneys' fees can be awarded." We, under that statute, we believe that is inapplicable here and the reason is is because really this case had two different claims.

The first claim was for actual damages incurred by the Gallegoses because of the encroachment on the property. From the very beginning there was no contest as to the encroachment. As soon as we discovered the encroachment was

there, there were probably not even a $1,000 of damages which had been incurred by that time. After that point it was a contest as to how much should be awarded to those damages.

As you remember in the trial brief when the damages were finally liquidated, the plaintiffs were asking somewhere around $127,000. In fact, the Lloyds strongly and vigorously defended that action based on each of those discreet elements of damage and the Court was persuaded, at least, in some of those such that when the judgment was rendered it was at $72,000 - about 56 percent of the amount claimed. We believe that shows that, at least, as far as the elements of damage and the amount of damage that the defense was not assertive without merit, but was asserted with merit, and was necessary for the trial to go forward as being defended.

The second part of that was the claim for punitive damages which was brought, as the Court may remember, several weeks before trial and was contested by the Lloyds, but we did go forward and the plaintiffs spent considerable amount of time eliciting evidence at trial as to the intent of the parties in the, in causing the encumbrance, the Court's specific findings, and we've gone back and reviewed the Court's findings, and the Court said the Court fails to find by a, oh, I can't remember-

THE COURT: Clear and convincing.

MR. DAVIS: Clear and convincing, I'm sorry, the

clear and convincing evidence that the Lloyds were guilty of wanton or willful disregard of the rights of the Gallegoses and that was a specific finding.

Therefore, the Lloyds were successful in defending that action. I believe because of the fact that we were successful in all of the one claim and significant in part on the other claim, the wrongful defense statute just doesn't stand. It doesn't work in this matter. Besides that, the bad faith that was being contested, when there is an issue for the bad faith attorney's fees is not in the conduct of the parties prior to the litigation, but it's in the conduct of the parties and their attorneys during the time of litigation. And I did bring a couple of cases with me that I can hand to the Court if the Court would like to look at them. One of them is Tenth Circuit case and the other is a Utah Supreme Court statute that says exactly that, that's the bad faith that we look at under the Bad Faith Statute.

The second prong of the assertion for the award of attorney's fees is the one which the Court specifically stated in the findings and fact, and that was - that it would be a consequential damage caused by the encumbrance or the trespass of the Lloyds on the Gallegos' property. This is a - that is a new principle that we could not find nor could the Gallegoses find support for in the law so far in the State of Utah. It is not a majority position. If the Court

goes that way, it will be making new law. There have been and in the case which was cited by both parties in the famous footnote where the Court - Utah State Court says that, the Supreme Court says that "we don't make this decision, but we do note that we have allowed consequential damages on, at least, two other situations." And those situations, one had to do with an employment case and the other one had to do with...

THE COURT: It was an insurance case.

MR. DAVIS: An insurance case, that's correct, where they had to go out and incur significant fees. I also on the, in the interest of fair disclosure, Your Honor, I did make another exhaustive research to see if there was any other times when the Court could exert its equitable powers to award attorney's fees, and I found two other instances where the Court has such a power.

One is before the Public Service Commission. There is a Utah State Supreme Court case where the Court says, "You, plaintiff, have incurred these attorney's fees that not only benefit your client but a whole class of people, therefore, we're going to award attorney's fees against the regulated industry in favor of you."

And the other one was in the distribution of a trust estate where one of the beneficiaries brought the action which benefitted all of the other defendants - the

beneficiaries, some of which were antagonistic to the lawsuit and the Court said, "in the interest of equity, we should have all of the attorneys' fees, or the attorneys' fees, shared by all the beneficiaries." I have not found, anywhere, where a tort action has been able to been the basis for an award of attorney's fees as consequential damages.

The one issue that I did see as far as the contract is concerned, is if - and there was an insurance, there was a construction contract where the attorney's fees were awarded, but not in the litigation. It was in the litigation that happened on the outside, for instance, if, in clearing off liens which had come against the property prior to or concurrently with the lawsuit against the contractor. That being said, what that would really mean is if the Gallegoses were required to obtain legal assistance or other professional assistance, not in the context of this lawsuit but in the other context in remedying the problem (inaudible), those fees or costs would be appropriately assessed against the Lloyds as consequential damages, but not the litigation expenses in this piece of litigation.

The last part of the argument goes to the Bill of Cost. I did not particularize my objections to the cost because that was like throwing chairs off of the Titanic. But, if we do not have, the-

THE COURT: I think the metaphor is straightening

the chairs on the Titanic.

MR. DAVIS: Straightening the chairs off the, I appreciate that - straightening the chairs. But the issue is is if the attorney's fees, and if Mr. Hunt's request for all the attorney's fees and all the costs are awarded, then it doesn't make any difference. If it doesn't, then we're really looking at a Bill of Costs, and the Bill of Costs under the *Frampton* case in the State of Utah it says that, yes, deposition costs and fees, if the depositions helped defer the case, should be awarded, and we agree to that. Also, costs that are to the Court or for service of process. But for $2,700 of copying charges and fax charges for expert witness fees, which were specifically stricken, in the *Frampton* case, those are not appropriate costs to be awarded against the losing party in a lawsuit. Only those costs which should be awarded for - to the Court or for witnesses for the statutory amounts.

THE COURT: All right. So, if you do not prevail on your first two points, how much of the cost bill do you object to?

MR. DAVIS: We object to $8,805.08. Those would be $2,796 of copy charges; a title report of $600; appraisal of $350; $500 rock, a rock wall estimate, mediation fee of $731; of $3,827 of the expert witness. I don't believe those were appropriate charges or costs under the rule to be assessed

against my client.

THE COURT: All right. Thank you. Let me hear from Mr. Hunt and I may have some questions.

Go ahead, Mr. Hunt.

MR. DAVIS: Thank you, Judge.

MR. HUNT: Thank you, Your Honor. I think the only thing that's at issue here today is the amount of the attorney's fees and costs. Entitlement was ruled upon by the Court at the end of trial. Findings of fact and a judgment were entered on July 19th, awarding of fees and making findings supporting that award, leaving only open the amount of the fees to be addressed by motion. There was no Rule 59 motion filed to alter or amend those findings of fact or to attack the judgment, or to attack the finding of entitlement.

Furthermore, there was no timely objection filed to the memorandum of costs and disbursement. Under Rule 54, you have five days to file an objection to the costs. No such objection was timely filed. So, they waived their right to challenge either the entitlement or the costs and really the only issue that should be properly before the Court here is the amount of the fees, and they have not filed a contrary affidavit challenging the amount of the fees that we've placed before the Court. So we find ourselves here with counsel now trying to attack both the entitlement issue as to the fees and the entitlement issue to the costs where the

time for doing so has already passed.

Now, that having been said, I think it's really important because the findings that are in the case have been entered by the Court and are essentially final, make some very specific factual findings that clearly provide the support for a 78-57-56 attorney's fee finding. For example, Finding 15, the Court says, "There were several physical markers required by the Lot 106 site plan which never materialized during the construction of the Lloyd's home. These markers included the presence of a 12- to 14-foot high embankment on the west side of the home, presence of two large retaining walls on both the west and east side of the driveway, and an average grade of the driveway of 8.5 percent with a maximum grade of 10 percent. The absence of these markers provided unmistakable notice to the Lloyds that there home was being constructed in the wrong location."

And then in finding of fact Number 29, the Court finds, "As a direct consequence of the actions and/or omissions of the Lloyds, the Gallegos were required to obtain counsel and pursue this action in order to resolve the boundary encroachment, adjust the lot boundaries, and render Lot 102 useable and marketable. The Lloyds initiated no action to address or resolve the trespass. In addition, the Lloyds failed to act in good faith in their defense of this action. And particularly, the Lloyds lacked an honest belief

in the propriety of their actions and ultimately took advantage of plaintiffs' property rights of which they knew or should have known. Their defense to the Gallegos' claims goes without merit. The amount of the plaintiffs' attorney's fees incurred should be established by motion pursuant to Rule 73, Utah Rules of Civil Procedure."

So, it seems to me that the defendants find themselves in a situation where they failed to challenge findings of fact and conclusions of law that have been entered by the Court pursuant to the rules, which require Rule 59 motion within ten days of entering the judgment. They didn't do that. Instead, they waited until we file seeking the establishment of the amount of our fees and then they try to challenge both entitlement as to fees and costs and, of course, the time to do either of those has already passed. And even if it hadn't, Your Honor, we believe that under the circumstances of this case, what we're asking for is proper. The cost that he's questioning were costs to prepare exhibits for the expert testimony that was necessary in order to determine how to resolve the boundary encroachment problem and finally, the deposition costs that were used in cross-examining the witness, which, although they weren't allowed in the *Frampton* case, deposition costs are within the discretion of the trial court to grant.

So, our position is (a) that they've waived the

right to challenge entitlement to either the fees or costs, either the award of attorney's fees or costs, and (b) there is no evidence before the Court regarding the amount except my affidavit and so it stands unchallenged as well.

And finally, I'd like to remark on this, two things. One is that at the end of the trial, the Court stated on the record that it was about that far from awarding the punitive damages and it was quite upset at how the evidence had come in and the obvious fact that the Lloyds had ignored and gone ahead with, essentially, intentionally and built their house on someone else's property.

And secondly, is that in the judgment which was entered on July 19th, the Court ordered the Lloyds to forthwith proceed to resolve the boundary issue - and they haven't done it. They haven't - there's no filings with the county to amend the plat to fix the judgment and no petition before the homeowners' association to get that approved and so we're now at five, four or five months, down the road, and it's the same pattern that was observed prior to trial where the Lloyds have got their pound of flesh and they're just sitting on it and my clients are sitting there with an unmarketable lot, so we've got that problem as well. Thank you, Your Honor.

THE COURT: Well, let me ask you a couple questions, Mr. Hunt.

MR. HUNT: Sure.

THE COURT: Mr. Davis argues that the court's references in the past, not this Court but the Supreme Court, the awarding damages under the statute, you have to demonstrate that there was a lacking and an honest belief in the propriety of the actions and/or activities in question. And Mr. Davis says that those activities in question have to come after the filing of the lawsuit and that's where the bad faith has to be present in order to get damages. Comment on that for me, would you?

MR. HUNT: Well, I'm not - I'm not familiar with the case he's talking about. The research that we did indicated that during the conduct of a trial, if a witness testifies in such a fashion that their testimony is utterly incredible, which the Court found Mr. Lloyd's testimony to be, that is, in effect, bad faith. That's a lack - that's a lack of merit to the defense because you're essentially trying to lie in order to defend your case. And so, in the *Katie vs. Johnson* case that we've quoted to the Court, the court specifically found that that was sufficient to support a finding of attorney's fees under the statute because-

THE COURT: So you assert, regardless of how reprehensible their conduct was before the lawsuit, the fact that he comes into court and makes statements which are incredible in court, constitutes bad faith sufficient to form

the basis of -

MR. HUNT: Exactly, but that theirs - that's exactly the *Katie vs. Johnson* case that I quoted in my brief. I mean, the Court found that that evidence to not only a defense without merit, but a lack of good faith, and lack of good faith is equated with bad faith, and they found that that would support a finding for attorney's fees under the statute.

THE COURT: Well, Mr. Davis says, "Well, they never really objected to the motion that their property was in trespass and, therefore, how can they possibly be in bad faith here?"

MR. HUNT: Well, I don't know what he means by "they've never objected that their property was in trespass". We had to try this case in order to resolve it. We went through a court ordered arbitration, I mean a mediation proceeding and they simply refused to recognize that they had caused the damage to the plaintiffs that they, in fact, caused and we had to take this thing all the way through a trial, and it was a contested trial. And so-

THE COURT: Well, but with that he says that "you were trying to get 127, Court only awarded the 72", so, you know, their defense, obviously, is, at least, in part, meritorious. Comment on that aspect of it.

MR. HUNT: Well, I suppose there's a range - there

was a range of damage evidence and the Court found within that range of damage evidence, ours was high, theirs was low, and the Court came down somewhere in the middle. But - and so with respect to the damages, perhaps, one could say. But for them to say they admitted the trespass and then for Mr. Lloyd to get on the stand and testify under oath repeatedly that he didn't know his house was located in the wrong place and that he'd lived there for eight years and it wasn't until we sued him that he discovered that his house was not built where it was located, he was lying. It was incredible. I mean, you couldn't be a senescent human being and reach that conclusion, and with all the physical markers that were so obvious to everybody in the courtroom and whatnot, and his own architect even refused to support him and sort of threw him under the bus during the testimony and distanced himself from the entire process. And so, you know, from our standpoint in terms of a finding of bad faith, his approach to the case is his denial in effect, perhaps, not in his pleadings, but his denial and unwillingness to come forward and do something about this problem that he created.

THE COURT: Tell me what you think the burden of proof is to show this bad faith. Is it preponderance of the evidence or is it something higher than that?

MR. HUNT: I don't know that the court has ever - I haven't found a burden in the statute, quite honestly.

THE COURT: So you're not aware of any higher burden other than preponderance?

MR. HUNT: Not that I'm aware of - not for the statutory findings. Certainly, if it was a punitive damage finding or a fraud finding, then I think that's correct. But those are because, really you're asking the court to-

THE COURT: So we could be in a situation where the Court determines that there's not clear and convincing evidence of - to justify punitive damages, but that there is a preponderance of the evidence that would indicate bad faith conduct?

MR. HUNT: Oh, absolutely. And I think the statutory, the statutory standard for bad faith attorney's fees under 78-27-56 is lower than the standard for punitive damages. I think the showing both by burden and by egregiousness is...

THE COURT: So if the Court indicated as it did, that he came very close to finding punitive damages, but not quite, it's not much of a stretch then to conclude that there was sufficient evidence, preponderance of the evidence, to establish bad faith?

MR. HUNT: Well, I thought the Court's finding was actually quite consistent with what his statements were regarding the punitive damage claim because, I mean, it was a, from my standpoint, looking at the evidence, I thought it

was very, it was a pretty egregious case and that's why I moved to amend the, add the punitive claim near the end of the case after we had the discovery done because I'm looking at this and I'm going, "Wow", you know, "There are a lot of things here that are very, very difficult to ignore." So, and I think that - I think really the best case to illustrate the point that the Court just mentioned is the *Katie vs. Johnson* case where the court actually said in there that for purposes of this statute, the absence of good faith is the equivalent of bad faith. And, of course, that's different than what you would have to show in a punitive case. I mean, it's a lower standard, and so I think that for a statutory purposes, the Court stating what you have to show are the two elements that Mr. Davis mentioned, and I think we've shown them. I think the Court's findings that already are of record in this case support the award of attorney's fees.

THE COURT: All right. Talk about the consequential damages issue and whether consequential damages ought to be awarded in an intentional tort situation involving, or in a trespass situation which involves intentional conduct on the part of one of the defendants.

MR. HUNT: Well, I don't want to mislead the Court on this because I think that footnote in the *Billings* case accurately sets forth the current state of the law in Utah on

that, and it, with respect to whether or not, in the, in an intentional tort case the court would extend that consequential damage rule to the award of fees, I think is an open question. I've seen it done. I couldn't find a Supreme Court case, but I've seen it done, for example, in a breach of warranty deed situation, where you, you know, you give someone a warranty deed and then you breach it and the attorney's fees are often awarded as a consequential damage of a breach of the warranty and a deed, but, again, that's more of a, that's kind of a quasi-contractual type case rather than a tort case. But, I mean, so I think it's an open question right now in Utah as to whether you could do that, but - and that's why, I think, you know, when the Court was ruling I also raised the 78-28-56 issue because I felt that in just viewing the evidence and given the Court's comments about how close the Court came to awarding punitives, that there was certainly enough evidence of bad faith to support an award under the statute, and so I think that clearly would support the Court's finding.

THE COURT: Well, just to make it clear, the Court found that the basis for awarding fees was alternative, in other words-

MR. HUNT: Correct.

THE COURT: - either and/or. So in a situation where we have the facts in this case, you feel that it is

foreseeable that the plaintiffs in this case would have to be incurring legal costs given the conduct of Mr. Lloyd and what he did? Is it your assertion that he should of foreseen that the Gallegoses would have to incur legal costs in order to resolve this problem?

MR. HUNT: Certainly, at some point along the line, I think he did. I think if he had been really pro-active and upon immediately discovering the, and I'm put "discovering" in quotes, the trespass, if he had been very pro-active and taking affirmative steps to resolve the boundary issue, tender and offer of a reasonable payment for their costs and damages and what-not, he could have mitigated this seriously. There was no evidence of mitigation - zero, none. I mean, basically, he sat on his hands until the Court entered a judgment, and now he's still sitting on his hands. And I think that's, you know, the light has to come on at some point and I think that's a fact in this case that is really disturbing to my clients, I know, because they're - they've felt like what has happened here is their property has been taken and then they've had to incur the expense and effort and time to solve a problem that somebody else caused, and it's been a very expensive endeavor for them.

And so I think that clearly, when you create a legal problem like this, because or when you trespass on, build a permanent structure on someone else's property, it

becomes a legal problem that the legal system sort of has to solve because you've mucked up the boundaries and whatnot of their property and you've got an encroachment. Now we've got marketability problems and it's going to take the intervention of, at the very least, counsel and some cooperative effort and, perhaps, in this case, the approval of the county council in order to solve the boundary problem, and at the worst, it involves the court to come in and force the issue, and that's where we find ourselves here, is we've had to ultimately resort to this Court for redress of this grievance because of the inactivity and lack of pro-active behavior on the part of plaintiff, even after he admits discovering the trespass.

THE COURT: And you're saying it's on-going now?

MR. HUNT: Yeah, God, I mean, we still can't sell the lot because the boundary's mucked up, and so we've got to get that fixed so that Joan and Andy can sell the lot and get on with their business.

THE COURT: All right. Thank you.

MR. HUNT: Thank you, Your Honor.

MR. DAVIS: Your Honor, may I just address the issue?

THE COURT: Well, I'm going to have you come up and answer some questions here first, and I'll let you say whatever else you'd like to say.

First of all, you assert that your client doesn't deny that his construction was basically a trespass; is that right?

MR. DAVIS: That's correct.

THE COURT: All right. So - and I know that you intend to appeal because you've already done it [unintelligible] your appeal, but I'm curious as to why he hasn't complied with the portion of the Court's order that would help to mitigate the damages that are ongoing that the Gallegoses are suffering?

MR. DAVIS: Within a week of the trial, we immediately contacted Mr. Hoffman and had him draw a new plat. I passed that on to George, or to Mr. Hunt. Mr. Hunt looked at it, told us he didn't like that, sent it back to us. We talked to him and we have had several communications over the last several weeks. Recently, he's remarked to us, Well, we really like that way that we originally told us, do that, so we're not getting, we've already talked to the homeowners' association. We're getting a plat, about to be signed that can be approved and move that through. As recently as last week we talked again, Mr. Hoffman, say "Get us a plat that then has approval signatures so we can take it." We have not laid on it. We've been having - and that first diagram was ordered within a week of after we were here and it was within a couple of weeks that we sent it to

George. So, it isn't true that we have done nothing. We have not scheduled the meeting yet with the homeowners' Association. We have talked to officers that we talked to earlier to say, "This is what we're going to do. Are we going to have a problem? What size and shape would you like the plat so we can have it brought appropriately to the group?"

We're not sitting back on our laurels or our haunches. We'd be happy to do this today. There's no reason we can't get it done. But we were not the one that changed our mind twice as far as which configuration we wanted.

THE COURT: Do you think that having your - one of your defendants testify at trial where his testimony is found by the Court to be incredible, whether that constitutes a bad faith defense in a case?

MR. DAVIS: I don't think so. I think, and I'm just guessing here, Your Honor, but I think in most of your trials you will find some of the testimony incredible. They don't match, the two different testimonies don't match - somebody is wrong. Somebody's not, either not remembering correctly or they're not telling you what the truth is. The testimony of Mr. Lloyd has not deviated one bit from the start.

The Court may have found it incredible. I'm not here to testify or to be a character witness, but Mr. Lloyd strongly asserts and continues to assert that notwithstanding

those diagrams, he did not know, nor did his wife know, nor did anybody have an inkling that he was on the Gallegos' property until the Gallegoses came to their door and showed them a survey. And immediately, what did he do? He called his surveyor to come out and redo it or relook at it. And that was not contested. He did come out and they said yes. And at that point they immediately said, "Can we go ahead and work this through?" And at that point, the Gallegoses said, 'No, we're already talking to our attorney. We'll go from there." This was not a long period of time from the time it was discovered and the time this lawsuit was filed. We thought we would settle it. This was a matter of weeks, not years.

THE COURT: Do you think there's a difference between the bad faith defense on liability issues versus a bad faith defense on damage issues?

MR. DAVIS: I don't see that anywhere. I see that-

THE COURT: Do you think that he defended the liability on the punitive damage issue?

MR. DAVIS: Yes.

THE COURT: And do you feel that his defense of that was in good faith?

MR. DAVIS: Yes.

THE COURT: All right. And even though the Court found that his testimony was incredible on that - on those

issues?

MR. DAVIS: When you asked me how I feel, you're asking a subjective issue. As counsel and as a clerk of the court, I believed his defense was in good faith.

THE COURT: All right.

MR. DAVIS: I agree with Mr. Hunt that there is a difference in the standard of, the standard of proof which is required, the clear and convincing for the punitive damage, and apparently, cause I see nothing to the contrary, just preponderance of evidence for the statutory attorney's fees.

THE COURT: So, it's possible that the claims for punitive damages may not rise to that level, but may rise to the level of bad faith?

MR. DAVIS: I think so. But if you do go to the level of bad faith under the statutory damage, it isn't just that it is being asserted in bad faith. It has to be an assertion which is without merit. Now, if that's the case, and even if the Court finds that a portion of the assertions were without merit, the Court shouldn't be able to award all of the damages, all of the attorney's fees under that because a significant portion of that had nothing to do with the bad faith.

THE COURT: But, again, we have a crossover issue of whether the bad faith has to be on all parts of the case, namely, liability and damages versus liability as opposed to

damages.

Tell me, it seems to me that lacking an honest belief and the propriety of the actions or activities in question, that appears to me to be a different standard than what you're articulating here with respect to the merits, and I'm wondering what case you cite with respect to the standard that you've just-

MR. DAVIS: Can I give a copy of this case to the Court?

THE COURT: Sure.

MR. DAVIS: This is a Tenth Circuit case, Your Honor. (Inaudible) marked up, if that's all right. And I've marked, (inaudible).

THE COURT: Well-

MR. DAVIS: -starting where it says-

THE COURT: Yeah, I guess this doesn't really answer my question.

MR. DAVIS: Okay.

THE COURT: And it seems to me that the Utah rule is lacking an honest belief in the propriety of the activities in question. And I don't know - I don't have the statute right in front of me at this point, but that may even be the statutory language, what's the code section?

MR. HUNT: 78-27-56.

MR. DAVIS: That is not the court language though, I

don't believe that.

THE COURT: "In civil actions the court shall award reasonable attorney's fees to a prevailing party if the court determines that the action or defense to the action was without merit and not brought or asserted in good faith except under subsection 2.

"The court in its discretion may award," this is 2, "The Court in its discretion may award no fees or limited fees against the party under subsection 1 but only if the court finds that the party has filed an affidavit of impecuniousity, or B, the court enters in the record the reason for not awarding." So, that's not relevant here I don't think.

Okay. Well, let me ask a further question and that is you've heard Mr. Hunt's Rule 59 argument. Respond to that.

MR. DAVIS: Rule 59 is there so we can make a motion for a new trial. We don't believe a new trial is required. This is - we believe this is an issue of law. It isn't even an issue of fact.

THE COURT: Doesn't 59(e) say that you have the right to file a motion to amend a judgment, and isn't that what you're asking the Court to do, alter or amend the judgment?

MR. DAVIS: That may be in sum and substance what

we're asking, but we're-

THE COURT: When does the clock start to run? When the final period is put on the attorney's fees award or some time before that?

MR. DAVIS: For the Rule 59 motion?

THE COURT: Yeah.

MR. DAVIS: It's probably at the, I don't know off the top of my head, I'm sorry.

THE COURT: All right. Okay. Anything further that you would like to respond to?

MR. DAVIS: I would apologize if I have been a day or two late on making objection because there should not be any prejudice from what we did. We thought we were complying with what needed to happen because the rule also says that the attorneys will be presenting their objection to that, so that's when we made our objection. And I apologize if I have wasted the Court's time or counsel's time. We thought this would be the appropriate time to get it before the Court and we worked hard to get the findings of fact. This was not an easy findings of fact to try and put together, and counsel's - counsel and I spend significant of time, amount of time to try and work those out. And the Court asked us to do that and asked us to try and work well together and not come back to the court. So, we specifically listened to the Court's findings and tried to stay as absolutely true to them as we

can, knowing that we have here a question of law.

THE COURT: Okay.

MR. DAVIS: Thank you, Your Honor.

THE COURT: Thank you, Mr. Davis.

Again, I compliment both of you and think you've both done an extraordinary job at trying to represent your respective positions.

It seems to me that there are, at least, two bases for awarding fees in this case. One is the statutory basis and I think that not only was Mr. Lloyd's conduct before the litigation commenced in bad faith, but I think his conduct after the litigation commenced was also in bad faith as evidenced in part by the fact that he came to court and testified, in my opinion, totally without credibility.

And, in addition, I see a difference in the standard between punitive damages and a bad faith finding, and I think the punitive damages requires clear and convincing, I found before, and I would reiterate that I didn't feel the evidence rose to that level. However, I did feel that the evidence rose to a preponderance level and that would be adequate in my opinion, given his post-commencement of litigation conduct that I think would justify the award of damages for bad faith in the litigation process.

So I feel that the bad faith is evidenced both before and after the commencement of the litigation. And

hence, the ruling in the *Morgan Roth vs. Delorian* case, I think my ruling is consistent with that.

Secondly, I think that there is in this - under these particular facts, justification for award of consequential damages. I feel that it was entirely foreseeable that Mr. Lloyd's conduct would necessitate, at least, some attorney's involvement and as time went on it became more and more evident, it seems to me, that there would be substantial attorneys involvement, and I don't see a good faith effort on behalf of the Lloyds to resolve the matter either earlier or even now. And despite Mr. Davis' representations about how they're trying to move forward, there's been more than enough time, it seems to me, for them to get this matter resolved in some appropriate way and so I'm disappointed to hear that it hasn't been moved along, and the last minute efforts to try to do things, I think, constitute some sort of cosmetic efforts in my view.

So we come down then to the amount of costs, the amount of attorney's fees. And taking the attorney's fees first, it would appear to me that some of the fees incurred really relate to the efforts to go forward with the second project and it's admittedly difficult to try to untangle the two. I think that was part of the problem in terms of damages in the case with respect to some of the experts. And I think it's - to a lessor extent, I think it's a problem

here. And so, consequently, what I would do would be to reduce the amount of attorney's fees that are petitioned by a factor of ten percent and that's using my best estimates to try to disentangle these two factors and be fair with both parties.

With respect to the costs, however, I would, again, in the exercise of the discretion that I have award the most liberal costs that I can to the plaintiffs because, again, it seems to me that all of that was foreseeable here as a consequence of what was taking place and that whether consequential damages are allowed or not, these particular costs certainly were foreseeable as part of the litigation and I think reasonably incurred.

The only exception of that would seem to me to be with respect to the copying charges and in that instance there were, I think, an excessive amount of copying charges incurred and so I would reduce the amount of copying charges by a factor of 50 percent.

So, all of that being said. I'm going to ask, Mr. Hunt, again, to prepare the order for today and let you review that with Mr. Davis again, and you can go from there.

MR. HUNT: Thank you, Your Honor.

MR. DAVIS: Thank you, Your Honor.

THE COURT: Okay, thank you.

(Whereupon the hearing was concluded) -c-

CERTIFICATE

I HEREBY CERTIFY that the foregoing transcript in the before mentioned proceedings held before Judge John Paul Kennedy transcribed by me from a FTR recording and is a full, true and correct transcription of the requested proceedings as set forth in the preceding pages to the best of my ability.

Signed this 29th day of January, 2007 in Sandy, Utah.

Carolyn Erickson

Carolyn Erickson
Certified Shorthand Reporter
Certified Court Transcriber

My Commission expires May 4, 2010